No. 286. 45.

Brief of Willie for P. E. Con mo

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No. 286.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

v.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ANSWER OF PLAINTIFF IN ERROR TO THE MOTION OF DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR.

A. H. WILLIE,
Counsel for Plaintiff in Error.

HATCH, DELANO & CO., PRINTERS, GALV.

No. 286.

In the Supreme Court of the United States.

October Term, 1897.

JACOB SONNENTHEIL, Plaintiff in Error,

v.

THE CHRISTIAN MOERLEIN BREWING COMPANY and J. J. DICKERSON, Defendants in Error.

Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Answer of Plaintiff in Error to the Motion to Dismiss the Writ of Error.

To the Honorable Supreme Court of the United States:

Answering the motion to dismiss, filed in this cause, plaintiff in error alleges that the jurisdiction of the Circuit Court of the United States for the Eastern District of Texas was invoked in this suit upon two grounds, viz., as to the defendant, the Moerlein Brewing Company, upon the ground that said Company was, when the suit was brought, a citizen of the State of Ohio, and the plaintiff a citizen of the State of Texas; and as to the defendant, Dickerson, upon the ground that the case, as to him, was one arising under the laws of the United States, and hence, the jurisdiction of said court, as invoked, did not depend entirely upon the diverse citizenship of the parties to the suit. (Rec., pp. 2, 62-73.)

ARGUMENT.

The defendants in error rest their motion to dismiss upon the proposition that "the judgment of the Circuit Court of Appeals is final, unless as to *all* parties there is jurisdiction upon a ground *other than* (though as to some it may be *additional to*) that of diverse citizenship."

This is an attempt to make the statute under which this writ was sued out, instead of reading that the judgments of the Circuit Court of Appeals shall be final "in all cases where the jurisdiction is dependent *entirely* upon the opposite parties being citizens of differents," read "where the jurisdiction is dependent either entirely, *or partly*, upon the opposite parties being citizens of different states." This changes the whole meaning of the statute, giving it a sense exactly opposite to that which its language conveys.

The statute, of course, refers to the jurisdiction of the United States Court in which the suit was filed, and to its jurisdiction of the whole case as presented in the complaint, and not to its jurisdiction as to any one or more parties to the cause. The court may have jurisdiction as to one defendant for one reason, and as to a different defendant, for another reason, but it requires both defendants to make up the case, and both grounds to give the court cognizance of the cause, as it is brought, and the jurisdiction of the case cannot, therefore, be said to depend entirely upon the particular ground upon which it is invoked as to either of the defendants. In the present case the defendant, Dickerson, was a citizen of the same state as the plaintiff. Jurisdiction as to him could not be claimed by reason of diverse citizenship, yet it was necessary that the court should have jurisdiction as to him or it could not take cognizance of the case. But for the fact that Dickerson was sued for an act done by him as United States marshal, the court would have dismissed the cause for want of jurisdiction, for it would have depended only in part, and not entirely on diverse citizenship, and as to the remaining defendant, there would have been no jurisdiction whatever.

The statute contemplates that there may be cases in which the jurisdiction will depend partly upon diverse citizenship and partly upon some other ground. If it had intended that this should be the state of the case as to each defendant, it would have said so, and not have been content with language that brings a suit like the present precisely within its terms.

The case cited, of Colorado Mining Company vs. Turck, 150 U. S.. 138, is no authority for the contention of defendants in error.

The only point decided in that case is that the fact that the jurisdiction of the suit does not depend entirely upon diverse citizenship, must appear when such jurisdiction is invoked, and if it is not thus invoked, it is not sufficient that another ground of jurisdiction is subsequently developed in the course of the proceedings.

Such, too, is the ruling in the cases of Rouse vs. Letcher, 156 U. S., 57; U. S. vs. Am. Bell Tel. Co., 159 U. S., 548; Borgmeyer vs. Idler, 159 U. S., 408; ex parte Jones, 164 U. S., 691.

In the present case the jurisdiction was invoked in the complaint itself upon two grounds, one of which was not diverse citizenship; and the case comes up to all the requirements of the foregoing cases, and its jurisdiction did not depend entirely upon diverse citizenship.

It is no answer to this to say that but for the fact that the Moerlein Brewing Company was a citizen of a state different from that of the plaintiff there would have been no jurisdiction against both defendants; for it is equally true that if the case against Dickerson had not depended upon an act committed by him as United States marshal, the court could not have taken cognizance of the suit; hence, the jurisdiction is as much dependent upon the case's arising under the laws of the United States as upon diverse citizenship.

It may be further remarked, that the provisions of the act of March 3, 1891, apply as much to one party to the cause as to the other, and if a plaintiff, who sues a United States marshal for a trespass committed by him in his official capacity, can not appeal to this court from a decision of the Circuit Court of Appeals, the

marshal can not do so if the judgment should be against him. This being the case it is in the power of the plaintiff ~~to~~ an action to deprive the marshal of his right to have his case adjudicated in this court by simply joining with him another defendant who is a citizen of another state, and against whom there is a like cause of action.

This would not be in accord with the general course of decisions which give to the officers of the general government the right to resort to its courts for an adjudication of suits against them growing out of their official conduct.

It is respectfully asked that the motion to dismiss be overruled.

A. H. Willis

Counsel for Plaintiff in Error.

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JAMES H. McKENNEY,
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Brief of Willie for P. E.
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vs.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

BY A. H. WILLIE,
COUNSEL.

HINTON, ROLAND & CO., PRINTERS, GALV.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On December 16, 1892, Freiberg, Klein & Co., a firm then doing business in Galveston, Texas, as wholesale dealers in liquors, cigars, etc., conveyed by deed of trust to plaintiff Sonnentheil their entire stock of goods, together with other property, and the debts due them, authorizing him to take immediate possession thereof and to sell the property and collect the debts, and apply the proceeds to the payment of cer-

tain creditors named in the deed of trust. This deed was filed as a chattel mortgage with the County Clerk of Galveston County, Texas, on the day it was executed, and plaintiff in error, as trustee, took immediate possession of the property therein conveyed.

Another deed of trust, dated December 17, 1892, was executed by the same parties to the same trustee to secure the same debts, differing from the first deed only in inserting some words which had been erased from the first deed, and in giving the trustee the power to compromise or sell the debts due the firm, and in binding the grantors and each of them, in the name of the firm, to make such further assurances, etc., as to the property conveyed as would speed the execution of the trust. This last deed was not recorded.

Sonnentheil was holding the property in question under both these deeds, when, on December 23, 1892, the United States deputy marshal seized and took it from his possession against his protest. This seizure and dispossession was made by virtue of a writ of attachment from the said Circuit Court in a suit for debt by the said Moerlein Brewing Company vs. Freiberg, Klein & Co., and the seizure was directed by the agent of the company. The Brewing Company was not secured in the deeds of trust. This suit was brought by Sonnentheil, the trustee, against the United States marshal and the Moerlein Brewing Company to recover the value of the goods thus seized and taken from him.

The defendants demurred to the jurisdiction of the Court, pleaded a general denial and attacked the deeds of trust as void on the face, and as not having been accepted by the trustee or preferred creditors, and as having been made with intent to defraud the unpreferred creditors of the makers, of

which fraud they alleged the trustee and preferred creditors had knowledge.

The specific objections urged to the deeds are that a provision allowing the trustee to compound and compromise doubtful debts due the makers was erased from the first deed before filing, and this provision and one authorizing each of the makers to make further assurances of title and transfer with the same effect as if made by each in person. That the makers of the first deed had a short time prior to its execution represented to two commercial agencies that they were solvent, and had thereby deceived the defendant company into selling them a large amount of goods on credit; that the deeds conveyed property exceeding in value the debts secured; that the claims provided for in the deeds were also secured by solvent indorsers. That the makers had, not long before the execution of the first deed, conveyed to L. Fellman a large amount of real estate for a feigned consideration and in secret trust for themselves, and for the purpose of removing the same from the reach of their creditors, and had conveyed to others a large amount of assets to hold for their benefit. That they had made to H. Kempner a deed of trust to secure a pretended debt. That the makers of the deeds had, long prior to their execution, and whilst insolvent, entered into a conspiracy with L. Fellman, who was indorser on a large amount of Freiberg, Klein & Co.'s paper, and with other persons, to remove the then present embarrassments of the firm and to continue business, and then, after enlarging their stock by purchases to a sufficient amount, to fail and secure Fellman and other home creditors, and that the deeds of trust were the result of this conspiracy.

The plaintiff replied, denying the allegations of the answer and alleging acceptance of the deed of trust before levy of

the attachment. Upon the trial it was shown that the deeds of trust under which Sonnentheil claimed were duly executed, that the first was duly filed for record, and that Sonnentheil was in possession of the property as trustee at the time the second deed was executed. That the debts preferred in the deeds amounted to about $140,000, all of which, except $10,000, were secured by the accommodation indorsement of Fellman & Grumbach, and none was secured otherwise. That several of the creditors had accepted the deed of trust before the levy of the attachment, and some of the secured debts were paid thereafter.

There was evidence tending to show that Freiberg, Klein & Co. were insolvent at times during the two years that preceded their failure. That several meetings between these parties—Fellman, Grumbach, Kempner and other parties—occurred, at which the question of their solvency, and how to protect them from failure, was discussed, and arrangements were made to reduce their debts, so as to render them solvent, so that they could continue business. After these meetings the firm continued business as before, buying and selling goods for cash and on credit. That at these several meetings it was determined that the firm should endeavor to make money by their business, but if they had to fail Fellman should be protected. There was also evidence to the effect that a short time prior to the failure Fellman promised to buy out their goods and let them carry on business in his name. The evidence also tended to show that before making the deeds a conveyance of lands for something less than their value was made by the firm to Fellman for cash, paid by him. Also, that Seinsheimer, one of said firm, had kept for awhile from the trustee some of the bills receivable of the firm, but

that the trustee upon finding this out had made him turn these bills over to him.

Other minor matters, occurring since the deeds of trust took effect, were admitted in evidence, such as correspondence between the trustee and Fellman, showing an effort on the part of the trustee to recover the amount of debts claimed by him to be due from Fellman to Freiberg, Klein & Co., attempted interference by members of the firm with the assets under the charge of the trustee, etc., all of which are fully set out in the assignment of errors and need not be repeated.

It was also shown that Freiberg, Klein & Co. had represented to a commercial agency several times during their insolvency that they were solvent, and thus obtained credit from the defendant company.

It was not shown that the trustee, or the beneficiaries in the deed of trust, had any knowledge of the several fraudulent matters laid to the charge of Freiberg, Klein & Co., and the plaintiff in error, claims that there was no evidence to show that they were in possession of facts to put them upon inquiry as to the same, which inquiry, if properly pursued, would have led to a knowledge of such fraud.

During the trial, the defendant offered evidence to show that subsequent to the deed of trust, and the acceptance of same by the secured creditors and the trustee, Freiberg, Klein & Co. were collecting for their own benefit some of the assets of the firm, and this evidence was admitted by the Court over the plaintiff's objections.

The defendants offered evidence that a debt secured in the deeds of trust had been paid since the deed took effect, which was admitted over plaintiff's objections.

The Court also permitted, over objections, a witness to testify as to statements made by Freiberg, Klein & Co. to

Dun's Agency as to their assets and liabilities not long before their failure.

The Court also admitted in evidence, over objections, a paper showing an untrue statement of the financial condition of the firm made to Dun's Agency just before the failure by one of its members; also a statement, which a witness thought was a copy from the record of Dun's Agency, of the condition of the firm in March, 1891, made by one of its members. This paper, and the one next preceding, showing the firm solvent, when, as the witness thought, they were not.

The Court allowed a witness, over plaintiff's objection, to read to the jury a copy of a report made by Freiberg, Klein & Co. on February 13, 1892, to Dun's Agency, showing the firm solvent at that time, when, in the opinion of the witness, it was not.

The Court allowed a witness to testify, over plaintiff's objections, as to interviews held by him, after the execution of the deed of trust and whilst the trustee was in possession of the goods, with one of the members of the firm, in which the latter made declarations as to the deed and his intentions in the future.

The Court also allowed a witness to testify, over objections, as to transactions between the firm and Fellman and others, which took place prior to the deed of trust, of which neither the trustee nor beneficiaries had knowledge.

The Court admitted, over objections, the testimony of a witness, to the effect that there were rumors afloat in 1892 as to the solvency of Freiberg, Klein & Co., after witness refused to state from whom he heard such rumors, or the particulars of the same. The plaintiff reserved exceptions to all such testimony, which will more fully appear from the assignment of errors.

The Judge charged that the deed was valid on its face. He left to the jury to determine whether the deed was accepted or not by any of the beneficiaries before levy of the attachment, and refused the request of the plaintiff to charge as to what constituted an acceptance. He charged that in order to vitiate the deed for fraudulent intent of the grantors that intent must have been known to the trustee or the beneficiaries of the trust, or they should have been aware before accepting it of facts which put them upon inquiry as to such intent. In the first part of his charge he added, which inquiry would have led to a knowledge that the instrument was fraudulent; but finally the Judge instructed the jury to find for the defendant if the accepting creditors knew of the fraud in the deed or were in possession of information that would put a prudent man upon inquiry as to the fraud, failing to instruct the jury that it must appear that such inquiry would have led to a knowledge of the fraud, and refusing to give a charge to that effect requested by plaintiff. The Judge left the jury to determine as to whether the plaintiff and the secured creditors had notice of the fraud.

The Judge also refused a charge to the effect that the deed had been accepted before the levy, and one stating to the jury what constituted an acceptance of a deed of trust.

He also refused to charge that the fact that a debt secured by a deed of trust was also secured by personal indorsement, would not prevent such deed from being enforced and carried out for the benefit of the secured creditors, and that such creditors would not be affected by any fraud committed by any other creditor, or by the person whom he held as indorser, if he had no notice of said fraud or reasonable cause to suspect it before his acceptance of the deed.

The Court refused a charge asked by the plaintiff excluding from the jury the evidence as to Seinsheimer's misconduct towards his partners, and as to the false statements made to the commercial agency, unless the jury believed from the evidence that notice of these things had been brought home to the beneficiaries in the deed. Also, a charge to the effect that knowledge of insolvency was not sufficient to put upon inquiry as to fraudulent intent.

The Judge also refused a general charge to find for the plaintiff the value of the goods attached at the time and place when and where they were seized by the marshal, together with interest from date at the rate of 6 per cent per annum. The jury found a verdict for the defendants. The case was taken by plaintiff to the Circuit Court of Appeals of the Fifth Circuit, and the judgment of the Court below was there affirmed. The opinion of that court rests the affirmance upon the ground that the only question submitted for its decision was the action of the trial court in refusing the said peremptory charge, and that said charge asked [illegible] findings of fact.

ASSIGNMENT OF ERRORS.

First—The trial court erred in admitting in evidence over the objection of plaintiff's counsel the following document:

(On the letter-head of Freiberg, Klein & Co.)

January 16th, 1893.

"*Mr. E. Browne:*

"Please accept order of Freiberg, Klein & Co. for $180 on policy, and oblige.

"Respectfully,

"JAMES E. BURKE."

"Profit and loss to cover difference in cash occasioned by amount short in various ways during absence, etc., since February, 1891, $2416.47," which was proved to have been made by Seinsheimer, one of the firm of Freiberg, Klein & Co., on or after December 24th, 1892, and subsequent to the execution, delivery and acceptance of the such deed of trust and its admission in evidence was objected to by plaintiff's counsel for that reason; and, further, because the entry related to cash shortage from February, 1891, to date of entry, and the said deed of trust gave the trustee no interest in the cash whatever, and he had no right to claim from Freiberg, Klein & Co. any cash, and the entry was the mere admission after the fact by a person who may have been interested in keeping a memorandum of a matter with which the plaintiff had nothing to do. The meaning of the entry was shown to be that this amount of cash was short in the mercantile transactions of Freiberg, Klein & Co. since February, 1891, and it had been charged to profit and loss.

Seinsheimer was acting as bookkeeper for plaintiff after he took possession under the deed of trust. During the time he thus acted he also made entries in the books of Freiberg, Klein & Co., which had been turned over by said firm to said trustee. Whilst plaintiff knew that he was making entries in these books, he did not know what such entries were, not having any interest whatever in such entries. He kept a separate set of books, in which were entered all the transactions relating to his trust, and looked into the books of Freiberg Klein & Co. only for the purpose of finding out what belonged to him as trustee, or to get the items of an account when it was to be settled, and for no other purposes.

The plaintiff's objections were overruled, and the evidence admitted subject to being controlled thereafter by the Court.

But the Court neither, by the charge nor otherwise, excluded or in any manner alluded to the evidence thereafter during the trial.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Third—The trial court erred in admitting in evidence the following matters:

1. Entries in the books of Freiberg, Klein & Co., showing a charge of $5000 against L. Fellman, which was one taken from those books and entered into those of the trustee.

2. Correspondence between the trustee and Fellman, which took place in May after the deed of trust was executed, in which the trustee notified Fellman of this charge against him and demanded payment of the amount, and Fellman replied that the $5000 was used by him to pay off a claim held by H. Kempner against Freiberg, Klein & Co., upon which Fellman was surety and which was secured by collaterals of little value, and he did not propose to pay the firm or the trustee anything until all the paper had been satisfied. The trustee was advised by his counsel not to file suit against Fellman, but make him give an account of the securities he held against the claim.

In connection with this entry and correspondence there was read a deed of trust from Freiberg, Klein & Co. to J. J. Eckford, securing Kempner for a debt of $5000 by lien upon property in Dallas, Texas. Two notes of $2500 each, signed by Freiberg, Klein & Co. and Fellman & Grumbach, payable to the order of the makers and indorsed by them, and marked on the back: "Paid by L. Fellman. H. Kempner." One of the notes was due December 30, 1892, and the other December 18, 1892, and both were payable to the order of the makers.

Also, an abstract of a judgment of G. Edloff vs. G. C. &

S. F. Ry. Co. and A. T. & S. F. R. R. Co. for $2462.59, dated April 25, 1893, which judgment was shown to have been one of the collaterals securing the above debt, and to have been transferred by Fellman to the trustee upon the latter paying Fellman the amount advanced by him in the matter of the Eckford collaterals, and said judgment being all that was left of the Eckford security after paying expenses. The trustee took this judgment from Fellman and still had it in his possession. It was shown that Fellman was security for Freiberg, Klein & Co. on a large amount of their indebtedness besides the Kempner claim. The trustee never knew anything of the deed of trust, and there was no evidence that the accepting creditors had any notice of it.

Plaintiff objected to the introduction of each and every portion of the above evidence, because it was irrelevant and referred to matters occurring after the deed of trust to Sonnentheil had taken effect, and could not affect the validity of the same, or the interest of the trustee or the beneficiaries, under the deed of trust, which objections were overruled by the Court.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Fourth—The trial court erred in admitting in evidence over the objection of plaintiff for irrelevancy, and being a matter occurring subsequent to acceptance of the deed of trust, the following letter to H. Kempner to J. J. Eckford, in reference to the Eckford deed of trust:

"Mr. J. J. Eckford, Dallas, Texas—Dear Sir: In the matter of Messrs. Freiberg, Klein & Co., Mr. Jacob Sonnentheil of this city is trustee for all their assets, property and assets, and the property assigned for my benefit in Dallas, all pro-

ceeds of sale should be accounted for and paid to him. Please deliver or pay to the order of Mr. Jacob Sonnentheil, trustee of Messrs. Freiberg, Klein & Co., all matters, money, etc., in your hands, which have been, or will now be, held for my benefit.

"Yours truly, H. KEMPNER."

And the said Circuit Court of Appeals erred in confirming said erroneous ruling of the trial court.

Fifth—The trial court erred in admitting evidence to show that a debt to the Citizens' Loan Company secured in the deed of trust to Sonnentheil had been paid since the deed of trust had taken effect over the objection of plaintiff that such evidence was irrelevant and referred to transactions occurring after the deed was accepted.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Sixth—The trial court erred in allowing the witness Grelling to read to the jury a statement made by him, whilst bookkeeper of Freiberg, Klein & Co., to Dun's Agency of the condition of the firm on September 29, 1892, which statement showed the assets of the firm to be $391,184.74, and their liabilities in notes and accounts $182,561.38; the witness further testifying that this statement was made and handed to him by Seinsheimer, one of the said firm, and was taken by the witness to Dun's Agency by direction of Seinsheimer, and that the statement was not true, as he did not think the firm was solvent at the time; and that the firm went on and bought and sold goods after making this report, buying some from the said Christian Moerlein Brewing Company, and that the firm could not have continued in business if a true report had been made to the agency.

To which evidence plaintiff objected, for the reason that neither the plaintiff nor any of the beneficiaries in the deed of trust had been connected with any such representations, and said trustee and beneficiaries had no knowledge of the same at or before the time when their rights vested under the deed of trust made to Sonnentheil by Freiberg, Klein & Co., but the Court admitted the evidence.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Seventh—The trial court erred in allowing the witness Grelling to read to the jury a paper which he said he judged was a copy from the record of Dun's Agency report made to said Dun's Agency on March 14th, 1891, by Freiberg, Klein & Co., showing the assets of the firm to exceed its liabilities, $209,157.09, the witness stating that the report was false, and the firm at that time, in his opinion, insolvent.

Plaintiff objected to the reading of this report, for the reason that neither the plaintiff nor any of the beneficiaries under the deed of trust had been connected with any such representations, and no one of them had any knowledge or notice of the same when the deed of trust was accepted.

And for the further reason that the paper offered was a mere copy, which, in the judgment of the witness, was taken from the books of Dun's Agency, and the books were better evidence. But the Court overruled the objections and admitted the evidence.

Eighth—The trail court erred in allowing the witness Grelling to read to the jury a like copy of report made by Freiberg, Klein & Co. to Dun's Agency on February 13th, 1892, from which it appeared that the assets of said firm exceeded its liabilities $200,987.42, whereas in the opinion of the witness it was insolvent.

Plaintiff's counsel objected to the reading of this report because it was not shown that either the trustee or any of the beneficiaries had any notice of the same when the deed of trust was accepted, and also because the paper purported to be a copy from the books of Dun & Co., which were better evidence. But the court overruled the objection and admitted the statement.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Ninth—The trial court erred in admitting in evidence the statements of Werner as to interviews had between him and Freiberg and Seinsheimer subsequent to the execution of the deed of trust, in which Freiberg is said to have asked him, Werner, as agent of the Moerlein Brewing Co., to give him, Freiberg, the agency for the sale of beer, and saying that after they got a settlement they would go right ahead, the beer would not change hands at all, go to the same customers, and that the firm was in such a shape that they had to fail, which evidence was objected to on the ground that it was hearsay and *res inter alios acta*. It related to facts which occurred after the deed of trust was made, and not shown to have been known or assented to by the trustee or beneficiaries of the deed of trust, and was incompetent to affect their interests. But the court overruled the objection and admitted the evidence.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Tenth—The trial court erred in allowing Moses Freiberg, one of the firm of Freiberg, Klein & Co., and a witness in behalf of the defendant, to testify over the objections of plaintiff, in substance, as follows: -

The firm of Freiberg, Klein & Co. were embarrassed in February, 1891, and had to scale a large amount of its indebtedness by paying a portion of the same out of the private means of the partners and obtaining a remission of a portion of the remainder; that this put them ahead financially and enabled them to continue business; that within two months afterward they were again unable to meet their obligations and held a conference with Fellman & Grumbach, who were their endorsers to the extent of about $135,000.00, and with Harris Kempner, another endorser, at which Fellman stated that he was endorser also on a large amount of other paper, and if the firm failed then, he would break; and it was agreed that it should continue business and try to pull through, but if it failed, Fellman was to be protected at all hazards by a bill of sale to him of its stock and business whenever the members found that they could no longer meet their obligations. Fellman expected a large amount of the firm's paper to be retired, and therefore insisted on it continuing in business. The firm was then solvent, but embarrassed. They continued buying and selling as usual, and in February, 1892, found their business in bad shape. It was perilous to their creditors to continue business, and it would take extraordinary good fortune to pull through. Rumors as to their failing condition impaired their credit in the spring and summer of 1892. They bought on credit when they could and paid cash when they could not, and continued to do thus down to within a few days of their failure.

In December, 1892, when they found they could no longer continue business, they telegraphed to Fellman to come home, their object being to raise the money through him to meet their debts or to sell out to him as agreed on.

He came to Galveston, and in conversation with the witness a few days before the failure, told the latter that after he had bought them out, the witness might run the business in Fellman's name till he could settle with his creditors, and Fellman would see that he got money enough for that purpose. The original agreement was to dispose of the stock by bill of sale, but at the last moment it was changed to a deed of trust, which Fellman preferred. Seinsheimer was brother-in-law to Kempner and Grumbach and son-in-law to Fellman.

After the attachments were levied, witness requested Fellman to replevy the stock or buy it out as promised, but he refused, as also to put up $25,000 to enable the firm to settle with their creditors.

Witness also testified that the second deed of trust was made on the Sunday following the execution of the first deed; that previous to making the first deed of trust the firm made a deed of conveyance of real estate direct to Fellman for $10,000 cash, and he considered the property thereby conveyed to be worth twelve or fiteen thousand dollars, and the deed was made in anticipation of the bill of sale or deed of trust. He considered the property transferred to Sonnentheil in the deed of trust worth $225,000.00 or $75,000.00 more than the debts secured.

That $20,000 of the notes transferred were withheld from the list by Seinsheimer, but upon demand of the trustee were turned over to him.

As to the Eckford deed of trust in favor of Kempner, he stated that he did not know that the firm owed Kempner anything, but supposed the deed was to secure an indebtedness to Fellman.

To the admission of which testimony the plaintiff objected, because it was not shown by the evidence that either the beneficiaries in the deed of trust or the trustee Sonnentheil, at or

before the execution of said deed and the acquisition of their rights thereunder, had any knowledge, or were chargeable with notice, of the matters testified to by the witness; and as the witness had answered upon cross-examination that neither the trustee nor any of the creditors secured in the deed of trust knew of any of the conversations or transactions he had testified to as occurring prior to or at the time of the making of the deed of trust, between the firm of Freiberg, Klein & Co., or any of its members and Fellman, or Fellman & Grumbach, the testimony so far as such conversations and transactions were concerned was further objected to because of such want of knowledge or notice on the part of said trustee or beneficiaries, but the Court overruled both of said objections.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Eleventh—The trial court erred in allowing the defendants to read as evidence to the jury over the objections of plaintiff's counsel the statements made in the depositions of E. H. Gorse, a witness for defendants, in answer to direct interrogatories propounded to him by defendants, which evidence was substantially as follows:

That in 1891 and 1892 witness was manager for R. G. Dun & Co.'s Commercial Agency, and that Grelling, the bookkeeper for the firm of Freiberg, Klein & Co., on February 13, 1892, made a statement to said agency showing the assets of the firm to be $407,828.26, and their liabilities $206,840.84, and that they made another statement September 29, 1892, showing their assets to be $391,184.74, and their liabilities $182,561.38. L. A. Grelling made the statements at the instance of Seinsheimer. Large firms made statements once a year, but this additional statement was required of Freiberg, Klein & Co., because it was rumored they were shaky and

their credit suffering. The foregoing statements are copies from the books of Dun's Commercial Agency in the office of the agency. Their financial condition was inquired about by merchants in the north and east, and rumors as to the same were discussed among brokers, bankers and merchants. This made him desire to post himself further as to their foundation, and he inquired generally with somewhat unsuccessful results, as Grelling and Seinsheimer misrepresented the condition of the firm, and bankers were not willing to tell the truth about the firm's affairs as far as related to the banks. These rumors were of sufficient importance to suggest a rigid examination by interested parties.

Witness also attached a statement of the assets and liabilities of Freiberg, Klein & Co., dated March 14, 1891, which he said was a copy of a statement made by Grelling to the agency, at the instance of Seinsheimer, on February 1, 1891. Being asked on cross-examination to state through whom he heard the rumors about Freiberg, Klein & Co.'s condition about September, 1892, he declined to answer, saying that to do so would be breach of faith. He also stated that it was his duty to investigate such rumors and to know and note their sources, basis and origin.

The objections to the answers of the witness to direct interrogatories were:

To so much as related to statements made by Freiberg, Klein & Co. to Dun's Agency, because, first, the matters testified to were not shown to have been known to either Sonnentheil, the trustee, or the beneficiaries under the deed of trust of December 16, 1892, at or before the acquisition of the rights of said beneficiaries under said deed. Second, because the testimony related to and embraced copies of original documents not shown to have been lost and not produced or other-

wise accounted for, and which were better evidence than the copies.

To so much of said evidence as referred to rumors and the sufficiency of said rumors to induce critical investigation by parties interested, because:

First—The testimony was as to the conclusions of witness, and not facts upon which the jury could form its conclusions as to the sufficiency of said rumors.

Second—Because the witness on cross-examination refused to give the particulars of such rumors, so as to enable the jury to form their conclusions thereupon.

And as to all said depositions, so far as they related to rumors about Freiberg, Klein & Co.'s standing and ability, because the witness, when cross-examined, particularly as to said rumors, and his source of information refused to answer in respect thereof, or to give the particular facts. The defendants, in answer to said objections, put in evidence the original report of the said agency of September 29, 1892, which corresponded with the copy testified to by the witness.

Whereupon the Court overruled plaintiff's objections, and allowed said testimony to be read to the jury.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Twelfth—The trial court erred in refusing to give the following instruction asked by plaintiff's counsel:

"The deed of trust in question in this case is valid upon its face, and the debts secured therein are shown to have been, at the time of its execution, the bona fide debts of the makers, Freiberg, Klein & Co. It has been further shown that some of the creditors named therein accepted said deed before the levy of the attachment of the Moerlein Brewing Company,

and it has not been shown that at the time of such acceptance such creditors had knowledge of any fraudulent intent in the making of such deed, or had any cause to suspect that the same was made with fraudulent intent. It has been further shown that the goods in question were seized by the United States marshal under an attachment sued out by the Christian Moerlein Brewing Company against Freiberg, Klein & Co., said seizure having been directed by said Brewing Company, and that said marshal took the goods from the plaintiff, who was at the time lawfully in possession of them under said deed, and converted them to the use of said Brewing Company. You are therefore instructed to find a verdict for the plaintiff against the defendants for the value of said goods at the time and place of such seizure, with interest thereon at the rate of 6 per cent per annum from the date or such seizure to the date of your verdict. Their cost in a distant market, together with the cost of transportation to Galveston, is not the measure of the value of the goods and property seized. Neither is the amount they may have been sold for at public auction. The true measure is what the goods would have sold for at wholesale at the place of seizure at the very time of the seizure."

It having been shown by the uncontradicted evidence that the deed of trust under which the plaintiff claimed title in this case to the goods seized by the defendant, J. J. Dickerson, under an attachment sued out by his co-defendant, the Christian Moerlein Brewing Company, and to recover damages for which this suit was brought, was a valid instrument on its face, and so held by the Judge before whom the cause was tried; that all the debts secured thereby were the bona fide debts of Freiberg, Klein & Co.; that several of the creditors secured by said deed had accepted the same before the levy of

the attachment of the Christian Moerlein Brewing Company, among others A. W. Fly, S. A. Walker, Adoue & Lobit, the First National Bank of Galveston, the Island City Savings Bank and the Citizens' Loan Company; and there was no evidence whatever that either of said parties knew of such intent of Freiberg, Klein & Co. in making said deed, or knew of any fact calculated to put them upon inquiry as to any fraudulent intent in making said deed, but the positive testimony being directly to the contrary, the defendants' witness, Freiberg, having testified that neither of said beneficiaries knew anything of the circumstances detailed in his testimony, which were relied on by defendants to show fraud in the deed, and the utmost extent of the facts brought to their knowledge being rumors that the firm was insolvent, and any inquiries prosecuted by them would have led up to no fact as to the deed of trust other than appeared upon its face, and that the makers of it were insolvent when it was executed.

It was also proved that the United States marshal, the defendant Dickerson, under an attachment sued out by the Moerlein Brewing Company, his co-defendant, had, by direction of said company, seized the goods in question in this case, and taken them from plaintiff Sonnentheil, who held them at the time as trustee for the creditors named in said deed, and had converted them to the use of said company.

It had been further shown what the goods thus seized would have been sold for at wholesale at the city of Galveston, the place of seizure, at the time of seizure, and the defendant had introduced evidence for the purpose of showing their cost price in distant markets and the cost of their transportation; as also what they actually brought when sold at public auction. The whole evidence required a verdict for the plaintiff,

and the Court should have left nothing to the jury except the amount of damages to be recovered.

And the Circuit Court of Appeals erred in sanctioning and affirming the refusal of said trial court to give the above recited charge.

Thirteenth—After refusing to give the foregoing, the Court erred in refusing to give the following special instruction asked by plaintiff's counsel, numbered 5th. Special Instruction:

"On the question of alleged notice of said alleged fraudulent intent, I instruct you that if Freiberg, Klein & Co.'s intention was fraudulent under the foregoing instructions, the preferred creditors to be affected thereby must have known of the said fraudulent intent at the time of their acceptance, or must have known such facts as would have caused a reasonably prudent man to have inquired into such intent, and have enabled him by reasonable diligence to have discovered such intent. Mere knowledge of Freiberg, Klein & Co.'s insolvency was not sufficient to put them upon inquiry as to the alleged fraudulent intent. Moreover, if such inquiry would have failed to discover the fraudulent intent, then they would not be chargeable with notice of such intent, unless they had knowledge of it."

The evidence having established the acceptance of the deed of trust by several of the preferred creditors prior to the levy of the attachment, and evidence having been admitted over the objection of plaintiff's counsel, to the effect that there were rumors in Galveston, prior to the failure of Freiberg, Klein & Co., as to the insolvency of said firm, which rumors may have been heard by the said creditors, and the court below having failed to instruct the jury as to the effect of a knowledge on the part of such creditors of the insolvency of

said firm, acquired by them before acceptance of the deed of trust, plaintiff's counsel asked the above instruction to the jury, which was refused.

And the said Circuit Court of Appeals erred in affirming the said erroneous ruling of the trial court.

Fourteenth—The trial court erred in refusing to give the sixth special instruction asked by plaintiff's counsel, which is as follows:

"On the question of acceptance, I charge you that none of the creditors secured by the deed of trust were required to accept in writing. Neither were they required to use the word *accept* in accepting the deed of trust. A creditor who communicated to the trustee, or to Freiberg, Klein & Co., his willingness to accept the security and benefits provided for him in the deed of trust, accepted the same. A corporation necessarily acts through agents, and the corporations named in the deed of trust could only accept through their authorized agents. If Lasker accepted the deed of trust for the Island City Savings Bank, the Citizens' Loan Company and the First National Bank, and he had authority from them, either express or implied, to do so, the said corporations accepted. In considering his authority, you will consider the offices he held, his previous conduct of the said offices, and the sanction, if any, accorded by the said corporations to his acts of similar nature, and to his acceptance, if any, in this matter."

It was proved that M. Lasker accepted the deed of trust, claiming to be the agent of the following creditors secured thereby. The First National Bank of Galveston, the Island City Savings Bank and the Citizens' Loan Company. It was proved that at the time he was vice-president and chairman of the committee of finance of the first-named bank and a member of the finance committee of the two other corpora-

tions; that he had charge of the financial matters of the bank, especially those pertaining to loans and securities, and that his action in reference to all such matters had never been repudiated by either of the corporations for whom he acted, but always approved, and the charter and by-laws of said corporations showed that there was no provision in any of them prohibiting it from allowing such agent from accepting a deed of trust for the bank's benefit, or conferring special authority upon any other agent to perform this service.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Fifteenth—The trial court erred in refusing to give to the jury the following instruction asked by plaintiff's counsel, numbered 6a, which is as follows:

"6a. The jury are to determine the rights of the parties to this suit, so far as acceptance or notice of fraud is concerned, by the facts as they existed at the time such acceptance occurred, and if they believe from the evidence that acceptance of the deed by the beneficiaries or any one of them took place without reasonable cause to believe that said deed was tainted with fraud, no subsequent frauds committed by the makers of said deed without the knowledge or acquiescence of such beneficiary or beneficiaries can affect the validity of the instrument."

The defendants had introduced testimony to show that, after the acceptance of the deed by several of the beneficiaries therein, some of the members of the firm of Freiberg, Klein & Co. had attempted to get possession of some of the assets of the firm for their own benefit and had made improper entries in the books of that firm, without the consent of any of such beneficiaries, and the Court in its general charge had failed to instruct the jury that such conduct, if fraudulent, could not

affect the validity of the deed as to such accepting creditors, which evidence the Court had admitted over the objection of plaintiff's counsel.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Sixteenth—The Court erred in refusing to give to the jury the seventh special instruction asked by plaintiff's counsel, which is as follows:

"7. The fact that a debt secured by a deed of trust is also secured by personal endorsement does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditor regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as an endorser upon his claim when he had no notice of such fraud or reasonable cause to suspect it at or before the execution of the deed and his acceptance thereof. The fact that Fellman, or Fellman & Grumbach may have been guilty of fraud, must not affect your verdict; if you find that any beneficiary in the deed of trust accepted the same without participation in or notice of such fraud, and it makes no difference that such innocent accepting creditor may have had Fellman & Grumbach's endorsement. The fact that Fellman, or Fellman & Grumbach, may have, subsequent to the attachment, paid off some of the claims secured by their endorsement, must not affect your verdict. Sonnentheil's right to recover depends upon the status of matters immediately after the levy of the writ of attachment. If he was entitled to recover then, he is entitled to recover now. If Fellman, or Fellman & Grumbach have been guilty of such fraud as should deny them the right to collect anything on account

of the claims they have paid, that is a matter that can not be determined in this suit, but must be passed on in the distribution of the funds in the hands of the trustee and in an appropriate proceeding for that purpose."

The defendants had introduced testimony tending to show that Fellman, who was one of the endorsers upon some of the claims secured in the deed of trust, had participated in some of the frauds alleged to have entered into the making of the deed of trust, and that as to the claims on which he was endorser, and that the deed was intended to secure him, and the evidence failing to show any knowledge on the part of any of the beneficiaries in the deed, whether those who held claims upon which Fellman was endorser or those upon which there was no endorsement, of any fraud whatever in said deed, or of any facts sufficient to put them upon inquiry as to such frauds or any other, and the court having failed in its main charge to instruct the jury upon the point covered by this instruction.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Seventeenth—The trial court erred in refusing to give to the jury the eighth special charge asked by plaintiff, which is as follows:

"8. I have necessarily admitted evidence which, at the time it was offered, I could not foresee the relevancy of. Such, for example, as the testimony relating to Seinsheimer's misconduct towards his partners, and the making of false statements to the commercial agency. In respect of this evidence I charge you, that unless you believe that all of the beneficiaries who accepted prior to the levy had notice of the alleged matters in evidence, they should not influence you to find against the plaintiff."

The court had admitted over the objections of plaintiff evidence to show that Seinsheimer, one of the firm of Freiberg, Klein & Co., had, before the execution of the deed, made false representations to a commercial agency to the effect that Freiberg, Klein & Co. were solvent, when, in fact, it was insolvent, and thus obtained credit for merchandise when it would otherwise have been refused, and the evidence failed to show that either of the beneficiaries named in the deed of trust knew of such false representations, or were put upon inquiry of the same; and it had admitted other evidence tending to show an intermeddling of a member of the firm with the assets of the firm to prevent their coming into the hands of the assignee, without showing any connection of either the assignee or any of the beneficiaries of the deed, or any knowledge or notice on their part of such transactions before the acceptance of the deed of trust.

And the witness, Freiberg, had also been allowed to testify that during the active existence of the firm of Freiberg, Klein & Co., Seinsheimer, one of its members, had abstracted and appropriated funds of the firm to his own use, and concealed the facts by false entries and figures in the books of the firm.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Eighteenth—The trial court erred in giving the following clauses of its general charge to the jury:

"* * * you are instructed that in this case, if you find from the testimony that any creditor had accepted this deed of trust before the levy of this attachment—which, bear in mind, was the 23d December, 1892—and you further believe from the evidence that any creditor named in that instrument had accepted the benefits of this deed of trust prior to the 23d day of December, or on that date—prior to the levy of the attachment,

and you further believe from the evidence that the firm of Freiberg, Klein & Co. did not execute the instrument for the purpose of defrauding their creditors, or if you believe they did execute it for the purpose of defrauding their creditors—yet, you fail to believe from the testimony that any creditor had notice of the fraudulent intent, or had the information that would have put a reasonably prudent person upon inquiry, and such inquiry would have led to the detection of the fraud, in that event you would find for the plaintiff * * *"

"* * * if you don't believe these creditors accepted, or any of them, before the attachment was levied, you will return a general verdict for the defendant, but if you find some of the creditors, or any of them, did, or any of them before the attachment, then you are to inquire into the question whether fraud existed or not * * *"

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in possession of facts that would have put a reasonably prudent person upon inquiry, you will find a verdict for the plaintiff for the value of the goods on the 23d day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent per annum from that date until now.

"In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston —two living at a distance and some of them represented here in Galveston—and you have the right to look to the relations of the parties, and all the circumstances surrounding them, in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accepting creditors,

if there were any, knew of it or of the facts that would have put a reasonably prudent person on inquiry."

Because in and by means of said clauses the Court left the jury to determine whether or not any of the beneficiaries in said deed of trust had accepted the same before the levy of the attachment of the Moerlein Brewing Company; whereas the question of acceptance *vel non* was a question of law to be determined by the Court, but if a question of fact positive and uncontradicted evidence in the cause fully established the acceptance of said deed of trust prior to the levy of said attachment by the trustee plaintiff in this cause, and thereafter formal and affirmative acceptance thereof by the beneficiaries in said deed of trust was unnecessary to give effect thereto, and moreover said positive and uncontradicted evidence fully established the acceptance of said deed of trust prior to said levy of said attachment by A. W. Fly, S. A. Walker, Adoue & Lobit, the Citizens' Loan Company, the First National Bank of Galveston, and the Island City Savings Bank, and by each of them, and all of said parties, were shown to be the holders at the date of said deed and acceptance of bona fide debts against the makers of said deed, which were secured by the same, and the plaintiff in the charges set forth in the twelfth assignment of error had asked for a charge removing the question of acceptance from the jury, which charge had been refused by the Court.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Nineteenth—The trial court erred in giving the following clause in its general charge to the jury, viz.:

"If you find as a matter of fact Freiberg, Klein & Co. intended by the execution of this instrument to defraud their creditors as defined to you then you are to extend your in-

vestigation, and if a fraud (if you find it was fraudulent) you are to determine then whether or not the parties preferred either had actual notice of that fraudulent intent or whether they had information that would have led to the detection of the fraud that would have put a reasonably prudent person upon inquiry, and upon inquiry he would have discovered the fraud. If you find no accepting creditor was free from this fraud, in fact, or was free from that information in regard to the surroundings, that would have put a reasonably prudent person upon inquiry, then no matter whether they accepted or not you would give a verdict for the defendants. In determining this matter I would expect you to be guided by the law I give you. I never invade the province of the jury; that is what you are here for; the disputed questions of fact; you are the judges of the weight of the evidence and the credibility of the witnesses, and thus being the judges you are to determine who has told the truth and who has not; and, in doing that, you have the right to take into consideration the interest of the parties; you have a right to take into consideration the manner of the witnesses on the stand; in fact you have the right to exercise your intelligence as you would in the most important events in life, sizing the man up by what he does from beginning to end, not by remote matters from here and there, but do what you think is right and just under the law; you must regard the law as your guide; we all bow to it, whatever the law may be, otherwise there would be no law."

"I mean, if you believe from the evidence that there is a single accepting creditor that had accepted the deed of trust before the attachment was levied, and that said creditor was not aware of any fraud upon the part of Freiberg, Klein & Co., and was not in possession of facts that would have put a

reasonably prudent person upon inquiry, you will find a verdict for the plaintiffs for the value of the goods on the 23d day of December, 1892, in Galveston, Texas, with interest at the rate of 6 per cent per annum from that date until now."

"On the other hand, if you find that any of the creditors had accepted said deed of trust prior to the levy of the attachment, but you find that Freiberg, Klein & Co. were guilty of fraud in the execution of said deed of trust, and that said accepting creditors knew of said fraud, in fact, or were possessed of such information as would have put a reasonably prudent person upon inquiry, in that event you will return a verdict for the defendants."

"What I mean is this: If you find from the evidence that any one creditor had accepted the deed of trust before the levy of the attachment, and that such creditor was not guilty of fraud himself, and was not aware of fraud in the makers of said instrument, or was not in possession of such information as would have put a reasonably prudent person upon inquiry, you will find for the plaintiff; but, on the other hand, if you find that the creditor, or creditors, had accepted said deed of trust before the levy of said attachment, and were either guilty of fraud themselves or were possessed of information that would have led a reasonably prudent person to infer that fraud did exist, you will find a verdict for the defendant."

"In determining the question of fraud, you have the right to look to the facts that most of the parties lived in Galveston—two living at a distance and some of them represented here in Galveston—and you have the right to look to the relations of the parties, and all the circumstances surrounding them, in order to determine the question of whether there was fraud, or was not fraud, and whether or not the accept-

ing creditors, if there were any, knew of it, or of facts that would have put a reasonably prudent person on inquiry."

Because the said clauses of the charge left to the determination of the jury the fact as to whether or not any of the beneficiaries in said deed of trust had knowledge of the fraudulent intent, if any there was, in the making of the same, when there was no evidence whatsoever to show that the beneficiaries who accepted said deed of trust either had knowledge of such fraudulent intent, if it existed, or that they were put upon inquiry as to such fraudulent intent by any circumstances which had been given in evidence; but, on the contrary, the uncontradicted evidence was that they had no knowledge when they accepted such deed of such fraud, if any there was, or of any fact that would have put them upon inquiry in reference to the same, and the plaintiff had asked of the Court, as shown in the twelfth assignment of error, a charge to the effect that there was no such evidence in the case.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

Twentieth—The verdict of the jury and the judgment rendered in the cause were unsupported by the evidence produced at the trial, and said verdict and judgment should have been in favor of the plaintiff instead of the defendants. The following facts, as appears by the bills of exceptions approved by the trial Judge, were established in evidence:

1. That the plaintiff, Sonnentheil, was, on the 23d of December, 1892, in possession of the property, to recover the value of which this suit was brought, holding it under a valid deed of trust, executed to him as trustee by the firm of Freiberg, Klein & Co., to secure the payment of certain bona fide debts due to creditors named in said deed.

2. That several of said secured creditors had duly accepted said deed of trust before that date.

3. That after such acceptance, and whilst plaintiff was in possession of said property under the deed, it was seized and taken out of his possession by the defendant, J. J. Dickerson, as United States marshal, and under and by virtue of a writ attachment sued out in the Circuit Court of the United States for the Eastern District of Texas by the defendant, the Christian Moerlein Brewing Company, said seizure and disposition being directed by said company, the plaintiff in attachment claiming that said property belonged to said Freiberg, Klein & Co.

4. That Fellman & Grumbach were endorsers upon some of the debts secured in the deed of trust, but some of said debts were not endorsed by them, or any one else, or secured in any way except by said deed of trust.

5. Even conceding that there was proof tending to show that Freiberg, Klein & Co. made the deed of trust with intent to hinder, delay or defraud the creditors not secured in the deed, and that Fellman participated therein, it was proven positively that none of the beneficiaries in said deed, before acceptance of the same, knew of any such fraud, and there was no evidence whatever tending to show that before accepting said deed of trust, either those who held Fellman & Grumbach's endorsement on their paper, or those who did not, knew of any fraud in the making of said deed, or of any facts which would put them upon inquiry as to fraud in the same, or that any inquiries they could have made would have led up to a knowledge of any fraudulent intent with which said deed was executed.

6. The value of the goods at the time and place of their seizure by the marshal was proven.

And the said Circuit Court of Appeals erred in affirming said erroneous ruling of the trial court.

"Twenty-first—Said Circuit Court of Appeals further erred in holding that the only question submitted to it for decision on appeal was as to the action of the trial court in refusing the charge hereinbefore set forth in the twelfth assignment of error, whereas the correctness of the rulings of the trial court on the several matters of evidence aforesaid, and the several charges refused and given by that court, were made the subject of the assignment of error and the brief of counsel submitted to that court.

Twenty-second—Said Circuit Court of Appeals further erred in holding that the charge made the subject of the foregoing twelfth assignment of error asked the Court to make five or any other number of special findings of fact, when it merely asked the Court to instruct the jury to find a verdict for the plaintiff upon the uncontroverted evidence.

Twenty-third—The Circuit Court of Appeals erred in not reversing the judgment rendered for defendants by the trial court and remanding said cause to said court for a new trial.

For all and each of said errors, plaintiff in error prays that the judgments of the Circuit Court of the Eastern District of Texas and of the Circuit Court of Appeals of the Fifth Circuit be reversed and the cause remanded for a new trial in said trial court.

POINT 1.

The deed of trust from Freiberg, Klein & Co. to Sonnentheil was duly accepted by several of the creditors secured thereby previous to the levy of the writ of attachment sued out by the Moerlein Brewing Company, and there was no evi-

The questions in this case arise upon the charges given and refused by the court below, and upon the rulings of that court upon the admissibility of evidence. These questions are as follows:

1. Was the deed of trust in question in this cause accepted by any of the preferred creditors before the levy of the attachment?

2. If this fact was proven by uncontradicted evidence, was it not error in the Court to leave it to the determination of the jury?

3. Was not the Court in error in its charge as to acceptance by a corporation, and in refusing a charge on that question as asked by the plaintiff?

4. Was the deed made in fraud of creditors, and if so, were the accepting *bona fide* creditors tainted with this fraud?

5. If any one of such *bona fide* accepting creditors was not thus tainted, and this was shown by uncontradicted evidence, was it not error in the Court to leave the question of this creditor's fraud to the jury?

6. The deed of trust being valid on its face, and all the debts secured therein being *bona fide*, and several of the secured creditors having accepted the deed without participation in the fraud or knowledge of it, and the law as to the damages in the case being well settled and undisputed, should not the trial Judge have charged the jury to find for the plaintiff, leaving to the jury only the question as to the amount of damages to be assessed by them?

7. Should not the trial Judge have charged as requested by plaintiff, that if the holder of a *bona fide* claim secured in the deed had no notice of any fraudulent intent in the making

of it he would not be affected by any knowledge of such fraud on the part of the ~~evidence~~ other creditors

8. Was it not error in the Court to admit the testimony of a witness as to rumors he had heard when he refused, on cross-examination, to state the source of his information?

9. Was it not error in the Court to admit the declaration of one of the grantors of the deed of trust in disparagement of the rights of the secured creditors; these declarations having been made after the trustee had taken possession?

10. Was it not the duty of the Court to direct a verdict for the plaintiff under the evidence adduced in the case?

BRIEF OF ARGUMENT.

The questions in this cause must be determined by the law and decisions of Texas when these decisions are applicable.

Baumbarger vs. Schoolfield, 160 U. S., 147.

White vs. Cotzhausen, 129 U. S., 329.

Under the decisions of that State the instruments in question here are deeds of trust; the property being conveyed to the trustee to be sold by him, and the proceeds, after paying expenses, to be appropriated to the payment of the debts enumerated in the deeds, and any surplus remaining to be turned over to the makers of the instrument. (Rec., pp. 119-127.)

AUTHORITIES.

Scott vs. McDaniel, 67 Tex., 315.

Jackson vs. Harby, 65 Tex., 710.

Milling Co. vs. Eaton, 86 Tex., 401.

Waterman vs. Silberberg, 67 Tex., 100.

Tittle vs. Van Lear, 34 S. W. R., 715.

Stiles vs. Hill, 62 Tex., 429.

Hudson vs. Eisenmayer Milling Co., 79 Tex., 401.

Igleheart vs. Willis, 58 Tex., 306.

That an insolvent debtor may prefer one or more creditors to the exclusion of all others by the execution of such an instrument, is well settled by the Texas decisions:

Jackson vs. Harby, 65 Tex., 710.

Waterman vs. Silberberg, 67 Tex., 100.

Scott vs. McDaniel, 67 Tex., 315.

Howell vs. Mars, 82 Tex., 493.

Willis vs. Thompson. 85 Tex., 301.

Haas vs. Kraus, 86 Tex., 301.

Tittle vs. Van Lear, 29 S. W. Rep., 1067.

Rock Island Plow Co. vs. Hill, 32 S. W, Rep., 242.

Such a preference may also be made by a direct conveyance of property to the preferred creditor:

Ellis vs. Valentine, 65 Tex., 332.

Lewy vs. Fischl, 65 Tex., 311.

Allen vs. Carpenter, 66 Tex., 138.

Owens vs. Clark, 78 Tex., 547.

Sanger vs. Colbert, 84 Tex., 668.

Smith vs. Whitfield, 67 Tex., 124.

But in a direct conveyance it is required that the value of the property shall be reasonably proportioned to the debts to be paid, or that such provision be made as to the surplus that it be not placed beyond the reach of other creditors for the benefit of the grantor.

See authorities just cited and Hamburg vs. Wood, 66 Tex., 614, and Black vs. Vaughan, 70 Tex., 47.

But when preference is given in a deed of trust it is not required that the property mortgaged shall be reasonably pro-

portioned to the amount of debts secured, our courts holding that in such instruments the excess is still subject to legal process. "It is," says the Court, "not placed beyond the reach of creditors, and hence they are not defrauded."

Simmons Hardware Co. vs. Kaufman, 77 Tex., 131.

As a result from the above rule as to direct conveyances our courts hold that where the property conveyed is reasonably proportioned in value to the *bona fide* debts paid with it, or if greater in value, the excess is applied to the payment of other just debts of the grantor, or left where the other creditors can reach it, the instrument is valid, though made with intent to hinder, delay or defraud other creditors, and the preferred creditor knew of such intent.

Lewy vs. Fischl, *supra*.

Owens vs. Clark, *supra*.

Sawyer vs. Colbert, *supra*.

Smith vs Whitfield, *supra*.

Greenleve, Block & Co. vs. Blum, 59 Tex., 126.

Black vs. Vaughan, 70 Tex., 49.

In Lewy vs. Fischl, just cited, the evidence showed that the preferred creditor knew that the debtor was insolvent, and that the sale to the preferred creditor was made with intent to hinder, delay and defraud the creditors of the maker, and especially the plaintiff. (65 Tex., 313.) But the court said at p. 320: "If the debt due Fischl was *bona fide*, and the Mareks actually owed, as it was admitted they did, the other debts provided for in the bill of sale, the purpose of the Mareks in making the transaction to defraud other creditors, actually known to Fischl when he accepted it, would not vitiate the transaction. The law, as recognized by this court, is stated in the case of Greenleve, Block & Co. vs. Blum, 59 Tex., 126, and the distinction between a creditor and a pur-

chaser, in the acceptance of such transfers, is distinctly announced."

By reference to the case of Greenleve, Block & Co. vs. Blum, cited by the Court, it will be seen that the distinction alluded to is this: A creditor who receives no more property than is reasonably equivalent in value to his debt, is not affected by notice of fraud in the conveyance, but a purchaser of the property is affected by such notice.

In accordance with this well settled principle it was held in Allen vs. Carpenter, 66 Tex., 138, that when a creditor took from his debtor more property than was reasonably necessary to pay his debt, he stood in the same position as any other purchaser, and if there was fraud in the sale and the creditor had notice of it, the sale was void as to other creditors. At the same time it was said that if the property had not been more than sufficient to pay the preferred debt the creditor would not have been affected by a knowledge of the insolvency of the debtor and his intent to hinder and delay other creditors. In Black vs. Vaughan, 70 Tex., 49, the same doctrine is asserted and the same distinction drawn between a purchaser and a preferred creditor. This last case is cited in Sanger vs. Colbert, 84 Tex., 672, as authority for the doctrine there distinctly announced as settled by the decisions of the Texas courts, viz., that a creditor has a right to take property sufficient to pay his debt, even if the debtor, with his knowledge, was insolvent and intending to defraud his creditors. See also Owens vs. Clark, *supra*.

These decisions rest upon the sound basis that where a debtor conveys no more property than is reasonably sufficient to pay a *bona fide* debt, and the creditor accepts it with the view of obtaining payment of such debt, a perfectly lawful disposition of the property is made, and the intent of the

debtor cannot affect the transaction. Hence, no notice of such intent on the part of the preferred creditor can vitiate it as to him. But where the debtor, instead of appropriating his property to the payment of his just debts, takes in return for it something that can not be reached by his creditors, he is devoting it wholly or in part, as the case may be, to his own benefit, and placing it beyond the reach of his creditors. His intent is fraudulent, and if the purchaser is put upon notice of such intent the sale is vitiated. If the conveyance be to the creditor of more than enough to pay his debt, the excess is placed beyond the reach of other creditors; and if the preferred creditor gives for such excess money or a negotiable note, or anything else that the process of law can not reach, he is upon the same plane with any other purchaser.

The transaction is valid if the purchaser is not chargeable with notice of fraud in the conveyance, if there be any, and invalid if he is thus chargeable. In accord with this view as to purchasers, we find that in Sweeney vs. Conley, 71 Tex., 543, a sale to a purchaser who agreed to pay off certain debts of the insolvent vendor, was upheld. In Elser vs. Graber, 69 Tex., 222, it was held that a preferred creditor might receive from his insolvent debtor more property than was necessary to pay the debt due the former if he bound himself to apply the excess to the payment of other debts of the insolvent. See also Frees vs. Baker, 81 Tex., 224; Ellis vs. Valentine, 65 Tex., 548.

It is very apparent from the several decisions we have cited that the law as to notice of fraud in case of a purchaser for money from an insolvent is very different from that which is enforced as to a purchaser from such a vendor in payment of a previous debt. In the former case, the purchaser removes from the reach of creditors a portion of the insolvent's estate,

and converts it into money which goes into the insolvent's pocket. If, therefore, such purchaser have notice that he is doing this illegal act, he must desist or have the transaction set aside. But in the latter case he does not remove the property from the reach of creditors, but make it go towards the payment of a just debt; and the payment will be good as to him, no matter what may be the intention with which it is done, and hence notice of such intention can not affect the conveyance. To do this the preferred creditor must have participated in the fraud. In the language of our Supreme Court, in Haas vs. Krause, 86 Tex., 689: "He may have known that the debtor would not have given him the security, but from a desire to defeat some other creditor in the collection of the sum due him, but this would not render it unlawful for him to take security for payment of the sum due."

Upon the distinction we have alluded to between a sale to a purchaser for money and that to a preferred creditor rests the decision we have already referred to, in Simmons Hardware Company vs. Kaufman, 77 Texas. There mortgages of more than enough property to secure the preferred debt are placed upon the same plane with direct sales to such preferred creditor of not more than enough to pay his debt, and the conclusion naturally follows that mere notice to such creditor of fraud in making the mortgage is not sufficient to vitiate it, but he must be a participant in the fraud itself for this effect to be produced.

We make these suggestions as to what notice of fraud will vitiate mortgages giving preferences, and also as to the effect of mortgaging more property than will secure the preferred debts, not because it is necessary to sustain the positions assumed on this subject in order to reverse the judgment below, for we confidently expect to show by the evidence that

the property mortgaged to Sonnentheil was not more than enough to secure the preferred debts, and that there was not a scintilla of evidence to show that the preferred creditors had any notice, express or implied, of any fraud in the deed, if such existed. If, however, the views taken on those questions are correct, the judgment must necessarily be reversed without consideration of the question of notice, as the proof is direct and positive that the preferred creditors who accepted the deed before levy of the attachment so far from participating in the fraud knew nothing of it whatever.

This leads us to the further principle established by the decisions of Texas, viz., that a deed of trust must be accepted by some *bona fide* creditor secured therein, in order to make it take effect.

AUTHORITIES.

Milling Co. vs. Eaton, 86 Texas, 401.

Tittle vs. Van Lear, 29 S. W. Rep., 1069.

This acceptance may be by acts as well as in express words.

Hubbard vs. Cox, 76 Texas, 239.

The rule is the same as in the acceptance of other contracts, deeds, etc.

Milling Co. vs. Eaton, *supra*.

Tuttle vs. Turner, 28 Texas, 759.

The Texas decisions are in accord with the general law on the subject.

Bump on Fraudulent Conveyances, 347, 348.

Ex parte Curry, 12 Arkansas, 302.

Wharton on Contracts, 8; 2d Ib., 707.

Pomeroy on Contracts, Sec. 69.

The acceptance, however, of any one *bona fide* creditor, not

affected by the fraud, is sufficient to sustain the deed, though all other creditors fail to accept, or have fictitious debts, or are tainted with the fraud.

Tittle vs. Van Lear, 29 S. W. Rep., 1069.

Howell vs. Mars, 82 Texas, 493.

Haas vs. Kraus, 86 Texas, 687.

Rock Island Plow Co. vs. Hill, 32 S. W. Rep., 242.

White vs. Sterzing, 32 S. W. Rep., 909.

The two cases last cited are decisions of the Court of Civil Appeals, an intermediate court, but under our judiciary system the decisions of this court become as authoritative as those of the Supreme Court itself when the latter court refuses a writ of error to have them reviewed, which is the case as to the decisions cited.

We now proceed to apply the Texas law as to the validity of deeds of trust securing creditors, to the facts of this case. *First, as to the acceptance of the deed by a bona fide creditor prior to the levy of the attachment.* The deed was made on the 16th of December, 1892, and filed in the County Clerk's office the same night. (Record, p. 123.) The goods were seized by the marshal, under the attachment sued out by the Moerlein Brewing Co., on December 23, 1892. (Ib., 106.) A. W. Fly was one of the creditors secured in the deed—the first on the list. (Ib., 121.) His debt was *bona fide*. (Ib., 151, 196.) He was informed by Sam Kramer of the deed of trust the night it was executed and that he was secured in it. He answered that it was all right, and repeated the same thing the next day. (Ib., 151.) Adoue & Lobit were *bona fide* creditors secured in the deed. (Ib., 121, 151, 196.) The trustee, Sonnentheil, informed Adoue the morning after the failure of Freiberg, Klein & Co. that Adoue & Lobit were secured, and he wanted Mr. Adoue's assistance in the management of the business. Adoue con-

sented; said it was all right, and hoped his firm would get its money back. Adoue attended two or three meetings with the assignee, where questions as to the management of the trust were discussed—one meeting the day he was informed of the failure, and two more a few days afterward. (Ib., 151, 152.) M. Marx testified that he was agent for S. A. Walker, one of the preferred creditors. He was authorized by Walker to accept, under the deed of trust, for him, and witness did so, and assented to the deed the next day after it was made. (Ib., 155.) All this was prior to the levy of the attachment (Ib.), and there was no evidence whatever to contradict or impeach the positive statements of these creditors. Fly's debt was $3,918.63, and was not secured otherwise than by the deed of trust. (Ib., 151.) Adoue & Lobit's debts amounted to $15,000, of which $10,000 was secured by Fellman & Grumbach's endorsement, and the other $5,000 secured by the deed of trust alone. (Ib., 151, 152, 153.) Walker's debt was a *bona fide* claim for $15,000. (Ib., 155, 126, 196.) Although the uncontradicted evidence showed that these creditors had unequivocally accepted the deed immediately after its execution, the trial Judge submitted to the jury the question as to whether or not any creditor had accepted the deed. The Judge said in his general charge to the jury: "If you don't believe these creditors accepted, or any of them, before the attachment was levied, you will return a general verdict for the defendant, but if you find some of the creditors, or any of them, did, before the attachment, then you are to inquire into the question whether fraud existed or not." (See eighteenth assignment of error; Rec., p. 277; bill of exceptions, Ib., p. 249.) The jury were, under this charge, without any instruction of the Court as to what constituted acceptance, allowed to defeat the plaintiff's recovery if they be-

lieved that Walker did not accept when his duly authorized agent swore, in so many words, that he did accept, and there was nothing in the evidence to contradict the statement. They were further allowed to find, as a fact, that neither Fly, nor Adoue & Lobit, had accepted, when the uncontradicted facts showed that they had done acts which in law amounted to an acceptance, thus leaving the jury to determine a matter of law which the Court should have decided for them. We have seen that in Texas an acceptance is implied from conduct (Milling Co. vs. Eaton, 86 Tex., 40, 405), or may be established by circumstances (Hubbard vs. Cox, 76 Tex., 239, 242). If there is a conflict of evidence as to the circumstances the jury determines as to their existence; but, when established by positive evidence, the Court determines as a matter of law whether or not they constitute acceptance. The Court's charge allowed the jury to find that there was no acceptance in spite of all this proof, and thereby defeat the plaintiff's case.

In addition to the Texas authorities already cited, we respectfully refer the Court to Devlin on Deeds, Sec. 261; Wharton on Contracts, Sec. 8; 2 do, Sec. 707; Pomeroy on Contracts, Sec. 69; Burrill on Assignments, Sec. 289. The positive statement of Marx that he accepted the deed for Walker, and had authority to do so, was in itself enough to make the deed effective as to that creditor under the rule in Texas, as we have already seen. Added to this were the like positive statements of Fly and Adoue, that when informed of the deed of trust, and that their debts were secured in it, they said it was "all right," which was a clear assent to the deed, and there was a like assent by Adoue, coupled with assistance by him, in making the assets pay off the secured debts.

It being the law of Texas that a trust deed must be ac-

cepted by some *bona fide* secured creditor to give it effect, it was a matter of vital importance to the plaintiff's case that this acceptance should be established, and if proven, that it should not be within the power of the jury to find that it was not; and that they should not be led to suppose that there was evidence tending to contradict the acceptance by reason of the Court having left to them the finding as to the fact of acceptance.

This court, in U. S. vs. Breitling, 20 How., 254, said: "It is clearly error in a court to charge a jury upon a supposed or conjectural state of facts upon which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures instead of weighing the evidence." Here the jury were doubtless led to believe that the Court supposed there was some evidence upon which they could find that there had been no acceptance of the deed by any secured creditor previous to the levy of the attachment, when there was no evidence of that kind whatever.

Rulings similar to the above were made in Goodman vs. Symonds, 20 How., 359, and Ins. Co. vs. Baring, 20 Wall., 159.

Indeed, this is the universal ruling of courts even in Texas, where judges are forbidden to charge on the weight of testimony, and very slight evidence is held sufficient to take a fact to the jury.

AUTHORITIES.

Wintz vs. Morrison, 17 Tex., 387.

20 G. N. R. R. Co. vs. Stewart, 57 Tex., 166, 170.

Hudspeth vs. Robinson, 18 Tex., 858.

Thompson on Trials, Secs. 1016, 1017, 1027, 1030, 2245.

If there were no other error in the proceedings of the court below this one is sufficient for a reversal, for the jury may have believed that the deed was not tainted with fraud; or, if thus tainted, that the secured creditors, or some of them, had no notice of it, and that everything else was right; yet, if in their view of the case the acceptance was not sufficient, they could find for the defendant. As the verdict was a general one, this may have been the ground upon which it was rendered.

In addition to the uncontradicted evidence that the three creditors just named accepted the deed, there was also ample proof of acceptance by the three corporations represented by Lasker. He was vice-president of the First National Bank of Galveston (a creditor secured in the deed); also, a director and chairman of the finance committee. (Rec., p. 145.) It was his duty to pass upon all credits as he deemed best at the time with or without consultation with other members of the finance committee. For fifteen years he had thus acted, and not a single act of his had been repudiated or his authority questioned. It had been his custom to look after debtors of the bank failing to pay their debts at maturity, or who became insolvent after or before their debts matured. This was a recognized custom of the bank, and he was thus acting at the date of the failure of Freiberg, Klein & Co. This bank accepted the security of the deed of trust made December 16,

1892. Sonnentheil came to him, and whilst Lasker did not say to him in so many words, "I accept," as he did not see any occasion therefor, he treated it as a benefit extended to the bank, and that it was his province to deal with it. On cross-examination he stated that he had done such things before, and they were sanctioned by the company. (Ib., 146, 149.) Witness also testified as to his relations to the Citizens' Loan Company and the Island City Savings Bank, which were about the same as towards the First National Bank, except that in the Citizens' Loan Company no loan was made without getting the approval of the other members of the finance committee in meeting, and the president was consulted in the case of the Island City Savings Bank. Witness was present at a meeting of the creditors secured under the deed of trust held before the levy of the attachment. It was the understood agreement of the Citizens' Loan Company and the First National Bank that he represented them at the meeting, and Kempner, president of the Island City Savings Bank, asked him to speak for that institution. He was there for the purpose of representing these corporations as accepting creditors under the deed of trust. They discussed at the meeting the employment of the former owners, and as to selling on a credit. He had frequent interviews with Sonnentheil as representative of the three institutions, the most notable of which was the next day after the failure. He gave him advice on the above matters. (Ib., pp. 145-149.)

The claims of these institutions were *bona fide*. (Ib., pp. 196, 220.)

The plaintiff asked the Court to charge that an acceptance need not be in writing; that to constitute an acceptance the word "accept" need not be used; but that if a creditor informed the trustee that he was willing to accept the security

and benefits provided for him in the deed of trust, he accepted it. That a corporation acted through its authorized agents. If Lasker accepted for the above corporations, and had authority to do so, either express or implied, the corporations accepted. That in considering his authority they would consider the offices he held, his previous conduct therein, and the sanction, if any, given by said corporations to his acts of similar nature, and to his acceptance, if any, in this matter. (Ib., pp. 80, 81.) This charge the Court refused (Ib., p. 274), but charged the jury that the acceptance must have been by a person expressly authorized by the company, or by a party in the management of the business, and the company must have known of the acts thus performed, and acquiesced in them. (Ib., p. 94.)

The authorities all sustain the charge asked. By permitting Lasker to exercise the functions he performed in this case, the companies, or at least some of them, held him out to the world as having authority to exercise them, and this, though the agent, had no such authority.

In Martin vs. Webb, 110 U. S., 7, the cashier of a bank had assumed to cancel a note and release a mortgage given to secure it. He had no authority by virtue of his office to do so; but this Court held that his authority might be inferred from the general manner which for a long period—sufficiently long to establish a settled course of business—he had been suffered, without interference or inquiry, to conduct the affairs of the bank. See also Com. Ins. Co. vs. Union Mutual Co., 19 How., 318; Mining Co. vs. Anglo-California Bank, 14 Otto, 192.

In Fifth Ward Savings Bank vs. First National Bank, 48 N. J. Law Rep., 513, it was held that if the treasurer of the company was held out by the managers as agent without par-

ticular authority his acts as such agent would be binding, and that question should be submitted to the jury.

Upon the same subject we cite Gulick vs. Grover, 33 N. J. Law Rep., 463.

1 Potter on Corp., 68, and authorities cited.

1 Beach on Corp., 186, 187.

In Ind. Rolling Mill Co. vs. St. Louis, Fort Scott and Wichita R. R. Co., 120 U. S., 256, it was held that ratification will be presumed unless disaffirmance occurs within a reasonable time.

In Page vs. Fall River, etc., Co., 31 Fed. Rep., 257, it was held that the unauthorized acts of a treasurer in borrowing money for a corporation were binding, as the directors by their course of conduct had held out the treasurer as fiscal agent for the corporation.

See also Thompson on Corporations, Arts. 4661, 4663, 4881, 5883, 4884, 4893.

The refusal of the above charge, made the subject of the fourteenth assignment of error (Ib., 274), was particularly damaging to plaintiff's cause in that it left the jury to infer, from the Court's general charge, that the corporations for whom Lasker acted must have known of his acts in this particular matter, and acquiesced in what he had done "in the premises." It may have been the intention of the Court to charge the law as it is contained in the refused instruction, but the language is capable of the interpretation we have given it, and tended to confuse the jury, and the instruction asked and refused would have made it more explicit and easily understood. The law is as in 120 U. S., 126, *supra*, that ratification is presumed unless disaffirmance occurs in a reasonable time. Ratification of the particular acts relied on as acceptance is not necessary; it is sufficient if the agent has acted

in like matter in former times, and these acts have not been disapproved.

The points we make as to the acceptance are taken under the eighteenth, fourteenth and twelfth assignments of error, and are as follows:

1. That the acceptance by Fly, Adoue & Lobit and Walker, three *bona fide* secured creditors, having been fully proven to have taken place before levy of the attachment, and no evidence contradicting it having been offered, and the acceptance of one *bona fide* creditor being sufficient, the Court should have so charged, and not left the question of acceptance to the jury.

2. That the Judge should have given our special charge as to acceptance by an agent of corporations, and not led the jury to believe that Lasker's acceptance should have been acqiesced in by the corporations.

2. Were the accepting creditors tainted with the fraudulent intent of the deed, if any such intent existed?

It is claimed that the deed was fraudulent for several reasons, but the Court will find, upon examination, that the matters alleged against the instrument are either insufficient to show that it was fraudulent, or if any of them are sufficient for that purpose, the secured creditors, or at least such as accepted the deed, had no notice of them at the time of acceptance.

1. It is claimed that the provision in the deed authorizing and requiring the trustee to sell as soon as possible and convey the personalty in parcels, or as an entirety, at public or private sale, gives him power to sell on credit and put the property into negotiable paper, secure against process of creditors. Also, that it gives the trustee a discretion that

enables him to consume an indefinite time in realizing on the goods. It is difficult to see how an express requirement, that the trustee shall sell the trust property "as speedily as possible" and out of the proceeds of the sales pay expenses and preferred debts, authorizes him either to delay sales or sell on credit. This construction is directly opposed to the ordinary signification of the language which seems to have been inserted for the express purpose of insuring an early conversion of the assets into cash proceeds for the purpose of paying creditors. The authorities relied on are not applicable to the facts.

2. It is also claimed that the first trust deed was altered by erasing the power given the trustee to adjust and compromise the debts and claims conveyed to the trustee, and that a second deed of trust restored the erased words; and that this last deed added the power to each partner to act for all the others in the course of the business, which second deed was executed on Sunday, and was never recorded. The power added is part of a requirement that the partners shall make such further transfers, assurances of title, etc., as to the trust property, as may be necessary to facilitate the execution of the trust. This clause is usually inserted in such deeds to enable the trustee the better to administer the assets, and had been left out of the first deed by mistake, as was shown by the evidence of Mr. Levi, one of the firm of lawyers who drew the instrument. He also stated that the power given either one of the partners to make such assurances, etc., was inserted because it was likely to happen that some one or more of the members of the firm would be absent when the execution of these instruments was required. (Id., 222-224.) If the validity of the second deed was at all affected by its being made on Sunday—as to which, however, the evidence was conflict-

ing—the recorded deed was still in force, and this had not the clause to which the objection is raised.

3. It is claimed that the deed provides for attorneys' fees through the whole administration. It provides that the trustee may pay the expenses reasonably incurred by him for such servants, clerks, agents and attorneys as he may employ to assist him in the performance of his duties. The attorneys are not named, and their compensation is not fixed, as in the case of Hill vs. Agnew, 12 Fed. Rep., 283, cited by defendants in error. It is held in Texas, that even if the attorneys should be named, it would be no badge of fraud unless the choice of them was injudicious. (Baldwin vs. Peet, 22 Tex., 720, 721.)

This provision of the deed gives the trustee no power that he would not otherwise have had, as he has the right to employ counsel to protect the trust property.

4. It is further urged that the deed is fraudulent on its face, because the items of indebtedness secured are uncertain as to amount, date, maturity, etc. The exact amount of each debt secured is stated, except in two instances, which constitute about $5500 of the $141,000 provided for, and the amount of these is approximately stated. No greater particularity in this respect could possibly be required, especially under the Texas decisions. (Van Hook vs. Walton, 28 Tex., 59, 74.)

So much for the intrinsic matters alleged to show the deed fraudulent. The trial Judge held the two deeds valid on the face; and, as to the failure to record the second instrument, held that this did not vitiate, as the trustee was in possession of the property when it was made. (Id., 234, 235.) No exception was taken to this ruling, and no question as to the above points submitted to the jury.

Next, as to extrinsic matters, which it is claimed render the deed fraudulent:

1. It is claimed that the grantors of the deed retained possession of the property conveyed, either alone or concurrently, with the trustee. The evidence on that subject is simply as follows: Louis Werner, the agent of the Christian Moerlein Brewing Company, on whose affidavit the attachment was issued, a witness for the defendant, testified that, hearing of the failure of Freiberg, Klein & Co., he came to Galveston some three days after the deed of trust was made, and was introduced to Sonnentheil at the store of Freiberg, Klein & Co. That Seinsheimer and Freiberg were also at the store, and some of the clerks of Freiberg, Klein & Co. (Id., 210, 211.) L. A. Grelling, also a witness for the defendants, stated that he had been in the employment of the Brewing Company since the levy of the attachment, but previous to that time was employed by Freiberg, Klein & Co., and was in the employment of the trustee from the day of the failure till the attachment was levied. (Id., 197.)

Sonnentheil, the trustee, testified that he took possession the night the deed of trust was executed. The keys were delivered to him along with the deed the evening it was executed, December 16, 1892, and from that time he exercised control of the establishment; no one had control or possession but himself. He made no agreement with anybody about employment in the trust before he took charge. All who were employed, including the grantors and the former employes of Freiberg, Klein & Co., were under his direction and were employed by him, and he told them that as long as he had use for them, and their services were satisfactory, he would keep them, but not a day afterwards. He paid their claims, and dismissed them when there was no further use for them. He made no

attempt to conceal the fact that he employed those people as his servants. He employed them because he thought he could best administer the trust speedily for the benefit of the beneficiaries of the deed, and all parties, by retaining the old hands for a time. (Id., 115, 116, 136.)

There was no evidence to contradict this, and as the testimony fully explains the presence of the grantors and other employes in the store after Sonnentheil took possession, the fact that they were present and assisting the trustee is fully explained. The trustee had a right to call these employes to his assistance. (Van Hook vs. Walton, 28 Tex., 59, 74.) The law of Texas, in this respect, is not different from that of Alabama, and this court said in the case of Bamburger vs. Schoolfield, 160 U. S., 149, that if nothing else appeared but the mere employment of the grantor by the trustee to assist in the disposition of the goods and getting in the book accounts, this circumstance would not show the transaction fraudulent. Even if at the time of sale there had been an agreement to employ the vendor, this fact would not of itself make the sale invalid. In the case at bar there was no such agreement, and the conduct of the grantor and clerks was fully explained and accounted for. It was, therefore, a much stronger case for enforcing what this court further said in the foregoing case, that is, that the court could have affirmatively instructed "that the employment of the vendor in a clerical capacity could not affect the validity of the sale." It might be added, if necessary, that even if the employment of these parties was fraudulent, the creditors, who had accepted the deed before such employment occurred, or, at least, became known, could not be affected thereby. And even had the acceptance happened afterwards, inquiry would have led to a knowledge

that the trustee had employed them on salaries for the benefit of the trust fund, a perfectly legitimate transaction.

2. It is further urged that the deed was fraudulent because it preferred creditors who already held personal security for their debts.

The evidence shows that Fly, whose preferred claim was for $3,918.13, had no other security for his debt, and that Adoue & Lobit held a note for $5,000.00 that was preferred in the deed, for which they had no other security other than the deed of trust. (Id., pp. 151, 153, 154.) These two claims being sufficient to validate the deed, this point might be here dismissed, but the question made has been decided against the contention of defendants by the Court of Civil Appeals of Texas in passing the very deed of trust we are now considering, Sonnentheil vs. Texas Guaranty & Trust Co., 30 S. W. R., 945. It was there held that the following charge, asked by Sonnentheil's counsel, should have been given to the jury:

"I charge you that the fact that a debt secured by a deed of trust is also secured by personal endorsement, does not affect the right of the owner of such debt to the benefits of the deed, and the same may be enforced and carried out for the benefit of such creditors regardless of any personal security he may hold for the same, and he is not affected by any fraud committed by any other creditor secured by said deed, or even by the party whom he holds as endorser on his claim, when he had no notice of such fraud or reasonable cause to suspect it, at or before the execution of the deed." (30 S. W. R., p. 950.)

This is in accord with the principle that a creditor may secure, with liens upon property, a debt already secured by personal endorsement, and is supported by abundant authority.

Kruse vs. Prindle, 8 Oregon R., 162.

Strong vs. Skinner, 4 Barb., 546.

Worland vs. Kimberlin, 6 B. Monr, 608.

Burrill on Assignments, Sec. 116.

3. It is also urged that the deed is fraudulent because, as is alleged, the property mortgaged exceeds in value the amount of debts secured. We have already shown that in Texas it is not fraudulent to secure a creditor by mortgaging property in excess of his debt. (Simmons Hardware Co. vs. Kauffman, 77 Tex., 131.)

And that a direct sale of more property than is necessary to pay a preferred debt is not void if the excess is not placed beyond the reach of creditors.

Applying these principles to the present instrument we find, first, that it is a deed of trust, providing that if any surplus or balance of the trust property and assets or of the proceeds remain, after paying the preferred debts, it is to be paid over to the mortgagors. (Id., 122.) The excess is thus left subject to the claims of other creditors.

In this view of the matter, it is unimportant whether the value of the property exceeded the amount of the secured debts, or how much was the excess. But secondly, no such excess existed. Freiberg testified that he considered the property worth about $220,000, some $75,000 more than the preferred debts. (Id., 194.) The trustee gave a careful and accurate statement of the value of the property as follows:

The nominal value of the assets received by him was	$317,000.00
Of these, the amount of worthless notes on insolvent persons was (Id., 117, 139, 140)	157,000.00
This left as available assets	160,000.00
The debts amounted to something over	140,000.00
Leaving an excess of, or about, one-seventh of the indebtedness	$20,000.00

If we take from this the probable expenses of the trust (trustee's commissions, rents, insurance, taxes, employes' wages, fees of attorneys, etc.), this $20,000 will be well nigh, if not entirely, consumed.

It was shown that they were not wasted, and did not depreciate in value in the hands of the trustee. (Id., 140.) One hundred and thirty-five thousand dollars would be the value of the estate if he succeeded in suits that he had brought, including the present one. (Id.)

In making this estimate, the trustee valued the goods seized under the present attachment at $84,000. If we are to take the estimate of the defendant's witnesses, derived from an actual sale of their goods, they were worth only $51,258.16. (Ib., 212.) That this is the true test in comparing their value with the amount secured, see La Belle vs. Tidball, 69 Tex., 165, 166. So the value of the property mortgaged was really less than the debts secured by several thousand dollars. We respectfully submit that the best test of the value of the mortgaged property is the amount realized for it in its careful administration. Even if we take the estimate of Freiberg, and deduct from it the worthless notes which entered into his calculation, we have a margin of excess amounting to only about 14 per cent of the amount of debts to be consumed in the expenses of the trust.

In the above cited case of Simmons Hardware Co. vs. Kauffman, the trial court found that the property mortgaged was worth $34,000, or an excess of $9000 over the $25,000 secured, and that this was not more than enough to secure the debt against all contingencies, and this finding was approved by the Supreme Court. The percentage of excess was more than twice as much as exists in this case, and the probable

contingencies here were much greater, as there lands only were to be administered, and here a stock of goods was to be sold, choses in action collected, and various other kinds of property disposed of.

Our decisions do not require, even in cases of direct sales to preferred creditors, that the property shall be exactly or nearly equal to the amount of debts paid, but that it shall be reasonably proportioned to the debts.

In proportioning the property in case of a deed of trust, the expenses of the trust must be considered, and the discrepancy between the debt and the property may be greater than in case of a direct sale. There is no authoritative decision in Texas to the contrary, the opinion cited above being the last utterance of the Supreme Court on the subject. (See also La Belle vs. Tidball, *supra*.)

4. It is also claimed that the deed of trust was void for actual fraud because it was executed in pursuance of a conspiracy gotten up by the grantors and Fellman & Grumbach, endorsers on a large amount of their paper, in which it was agreed that the grantors should continue business, though insolvent, and buy goods on a credit, and should at the proper time fail and sell to Fellman sufficient goods to secure him against loss by reason of his endorsement. Fellman was father-in-law of Seinsheimer, one of the members of the firm, and Grumbach and Seinsheimer had married sisters. H. Kempner was charged to be a participant in the alleged conspiracy, and he was a creditor of the grantors and brother-in-law of Seinsheimer.

It is claimed that this agreement was first entered into in February, 1891, and was kept alive by subsequent interviews of the parties had in April of that year, and in February, 1892.

It is further claimed that, in pursuance of this scheme, the firm did continue business, and did buy goods on a credit, even during the summer of 1892 and up to within a short time of their failure, and that the deed of trust in question was executed in pursuance of the agreement.

Evidence was introduced showing an interview between Fellman and Freiberg, one of the firm, a few days before its failure, in which the former stated that when he bought out the firm's stock he would let it continue business in his name till it could settle with creditors. (Id., 187-195.)

Evidence was introduced to show that in March, 1891, February, 1892, and September, 1892, the firm made to Dun's Agency false representations as to its financial condition, showing itself solvent when it was not. (Ib., 199, 200, 201, 206, 207.)

Also, that Seinsheimer, one of its members, retained for awhile from the trustee some of the bills receivable of the firm, but turned them over when they were demanded by the trustee. (Id., 120.)

Some matters occurring after the trustee was in possession of the trust property, and administering it, were admitted in evidence over the objections of plaintiff. These consisted of entries made by Seinsheimer in the old books of the firm. (Id., 130.) Attempts of some members of the firm to get possession of some of its assets without the knowledge or against the consent of the trustee. (Id., 129, 130, 132, 133.) Declarations of one of the grantors as to what would be done in reference to a settlement of the firm's debts. (Id., 211.)

The foregoing are substantially all the grounds relied on to show that the deed of trust in question was made with fraudulent intent.

An analysis of them shows that none of these relied on, as appearing on the face of the deed, find any support in law, and the trial Judge so charged the jury.

That of those depending on extrinsic evidence, the law does not sustain that which attacks the deed because a portion of the creditors were secured by personal endorsement. That the undisputed facts show that the grantors did not retain possession of the goods, either absolutely or concurrently with the trustee.

That the undisputed facts show that the property mortgaged was not more than reasonably sufficient to pay the preferred debts, and the expenses of the trust, and if it was, the excess was not sufficient to be evidence of fraud. That the preferred creditors could not have known at the time that they accepted that there was any excess, and that by the laws of Texas an excess of property over the debts does not vitiate a deed of trust.

There is but one ground left upon which the deed of trust is attacked for fraud, viz., the alleged conspiracy between the grantors and Fellman to protect the latter by a sale of their goods to him, and thereby to defeat their other creditors. The other matters from which a fraudulent intent is sought to be inferred, such as the false representations to Dun's Agency and purchases of goods just previous to failure, seem to be relied on as being in furtherance of the alleged conspiracy, but whether introduced for that purpose or as independent facts, tending to show fraud, our defense against them is that the preferred creditors had no notice of their existence when they accepted the deed of trust. Bearing in mind that, under the law of Texas, if one *bona fide* preferred creditor accepts the deed without notice of any fraudulent intent in

its execution, the deed is valid, we proceed to show from the evidence that the defendants utterly failed to prove that the accepting creditors had any such notice before accepting.

The facts relied on as to the conspiracy—the false representation as to solvency and the purchase of goods just previous to the execution of the deed of trust—have been already briefly stated. We now add that as to the conspiracy alleged to have been concocted at meetings held in February, 1891, April, 1891, and February, 1892, Freiberg, the witness who testified as to what took place at these meetings, also swore that neither of the beneficiaries in the deed knew anything of these meetings or what occurred at them. Also, that neither of them knew of the interview between himself and Fellman, which, he testified, occurred a few days before the deed of trust was made. (Id., p. 197.)

As to the false representations made to Dun's Agency, and the purchase of goods by the firm from the Christian Moerlein Brewing Co., there is a total absence of all evidence to show that the beneficiaries of the deed knew anything as to these when they accepted the deed. It is to be remarked, also, that it was found that the firm bought no more goods than was necessary for the proper running of their business. (Id., 196.)

As to the failure of Seinsheimer to deliver to the trustee some of the bills receivable till demanded, this fact could not have affected the transaction, and hence knowledge of it could not have had any such effect, and no such knowledge, was proved

We are led to the inevitable conclusion that so far from the the evidence showing that the trustee and beneficiaries participated in any fraud with which the deed may have been tainted, there was no proof that the trustee, or any one of the accepting creditors, had any knowledge whatever of such fraud.

As we understand the contention of defendants, it is not that the preferred creditors or trustee had such knowledge, but that they were affected with constructive notice of the fraud, *i. e.*, that they had knowledge of facts which put them upon inquiry as to the fraud, which inquiry, if properly pursued, would have led to such knowledge.

We proceed to show: First, that the creditors were not put upon such inquiry; second, that such inquiry would not have led them to a knowledge of fraud; third, that if put upon inquiry and it would have led to a knowledge of the fraud, the deed would still have been valid as to the accepting creditors.

1. The only fact which it is contended was known to the accepting creditors was the insolvency of Freiberg, Klein & Co.

As to this we say: 1. That if Freiberg, Klein & Co. were insolvent when they made the deed, and this insolvency had been known to all the accepting creditors, it would not have put them upon inquiry as to fraud in the deed.

An insolvent debtor having the right to prefer creditors, notice that the debtor making the preference is insolvent can not possibly put upon inquiry as to fraud. It is notice of the performance of a lawful act. To hold the contrary would be to charge a preferred creditor with notice of fraud whenever it occurred in an instrument preferring creditors, made by an insolvent, and to render all such invalid when made with fraudulent intent, regardless of actual notice to the preferred creditor.

In Scott vs. McDaniel, 67 Tex., 316, and in numerous other Texas decisions, the right of an insolvent to prefer creditors is asserted. In Simmons Hardware Co. vs. Kaufman, 77 Tex., 131, the distinction between sales by insolvents and deeds of trust made by them to preferred creditors, is recognized. In the former, knowledge of insolvency will vitiate the sale if

more property is sold than is reasonably necessary to pay the debts, unless the excess goes to pay creditors or is left within their reach; in the latter, knowledge of insolvency does not affect the transaction as the excess is subject to other debts of the grantor.

2. There was no proof that the accepting creditors knew that Freiberg, Klein & Co. were insolvent. Indeed, the proof is directly to the contrary. The evidence relied on to show knowledge of insolvency is about this: Gorse, manager of Dun's Agency, testified as to the false statements made to the agency by Seinsheimer, which showed the firm to be solvent. The last, or September statement, was made at his request, as he had information from other sources that the firm was shaky and their credit suffering. He regarded the statement as showing a healthful financial condition, provided it was correct. Rumors were afloat in Galveston, general in their character, that they were slow in their payments, owing largely to banks and individuals. These made the witness desire to post himself as to the foundation of them, and he inquired without successful results, as Seinsheimer and Grelling misrepresented their financial condition and the banks would not tell him about the firm's affairs so far as related to the banks. The rumors were of sufficient importance to suggest a most rigid investigation by interested parties. (Id., 206-207.)

The witness, on cross-examination, refused to give the names of the persons from whom he heard the rumors, saying that it would be a breach of faith to do so. (Id., 208.)

Werner, agent of the Brewing Company, said that the company learned from their agent that certain traveling men had told him that Freiberg, Klein & Co. had been refused credit. (Id., 212.) This led him to make inquiries as to their financial condition, as they owed the company a large amount. He

went to Dun and Bradstreet and told them he wanted special reports, as they were supplying them with goods, and wanted to know their true condition, etc. After reading over the statement at Dun's Agency he concluded they were all right. (Id., 210.) This is about the sum and substance of the evidence relied on to affect the beneficiaries with a knowledge of Freiberg, Klein & Co.'s insolvency. On the other hand, it was proven by A. W. Fly, an accepting creditor, that the evening the deed of trust was made he heard some little rumors that the failure was contemplated. (Id., 151.) Lobit, of Adoue & Lobit, accepting creditors, said he did not know the failure was imminent or impending. (Id., 153.) Indeed, so little did this firm suspect the insolvency of Freiberg, Klein & Co. that it loaned them $5,000, without security, only thirteen days before the failure. (Id., 153.)

Stowe, cashier of the First National Bank of Galveston, an accepting creditor, testified that he heard no rumors during the fall of 1892 or before, as to Freiberg, Klein & Co.'s insolvency, and had there been such in Galveston, he would have heard them. He considered them good, and renewed their paper whenever asked to do so. (Id., 221.)

Beers, secretary of the Citizens Loan Co., an accepting creditor, testified that he was also an insurance agent, was in touch with all the banks, and met people in his office engaged in financial matters. Had there been rumors of the firm's insolvency within two or three months of its failure he would have heard them. He had heard no such rumors, and was surprised to hear of the failure. (Id., 220.)

Sonnentheil, the trustee, said he heard of the expected failure on the Monday before the 16th of September, 1892, when he was asked by Fellman to act as trustee. (Id., 118.)

There was other testimony tending to show that the accepting creditors had never heard the alleged rumors, and none to show that they had. (Id., 151, 153, 145.)

3. If rumors of insolvency are to be treated as putting a creditor upon inquiry as to fraud in a deed of trust preferring them, this would not be sufficient to charge them with constructive notice of fraud unless the inquiry suggested would have led to a knowledge of the fraud. The party who started out in search of fraud, induced by such rumors, would have nothing to guide him to persons or papers. He would not be bound to apply to the grantors, and if he had he would probably have received the same information they gave to Dun's Agency; and if he had applied to that agency, he would have received the same information given to Werner, and its books would have showed the firm to be solvent. But knowledge of insolvency thus obtained would be no more than was learned from the deed of trust itself. The inquirer would have found no evidence of fraud, or anything to make him suspect it. This, if it existed, was in the breasts of the parties to it, and of them he was not required to seek the information. (Leading Cases in Equity, Vol. 2, Part 1, p. 166; La Neve vs. La Neve, 4 De Gex., Mac. & G., 473; Ware vs. Lord Egmont, 31 Eng. Law and Equity, 89.)

To sum up our contention as to notice, we claim: 1. That there is absolutely not a scintilla of evidence that the trustee, or the accepting creditors, participated in any fraud with which the deed of trust may have been tainted, or that they knew anything about it whatever.

2. That there is absolutely no evidence that they were in possession of any fact that put them upon inquiry as to fraud in the deed; the only fact relied on being that the makers of the deed were insolvent when the deed was made, and of this

some of them at least knew nothing until the deed was actually executed, and knowledge at that time could not affect the rights of the beneficiaries.

3. That even if the accepting creditors knew of this insolvency, and it put them upon inquiry as to the circumstances under which the deed was made, this inquiry could not have led up to a knowledge of the fraud. The Brewing Company's inquiries led it to sell more goods to the firm on credit.

We, however, earnestly insist that, under the decisions of the Supreme Court of Texas, implied notice of fraud is not sufficient to vitiate a deed of trust preferring creditors, especially where the value of the property mortgaged is not unreasonably excessive for the purposes to which it is devoted, or not placed beyond the reach of creditors.

We further claim that the charge set forth in the sixteenth assignment of error should have been given, as it was undoubtedly the law, was material to the case, and had not been included in the Court's general charge. For the law governing this charge, see page 56 of this brief.

In such case the preferred creditor must have participated in the fraud, or known of its existence, and the deed will be good if one accepting creditor is not thus affected by express notice. Implied notice applies only to a purchaser, or one who, for the benefit of the grantors, and not to secure a just debt, helps them to place their property, or a portion of it, beyond the reach of their creditors.

This is decided exactly as stated in White vs. Sterzing, 32 S. W. Rep., 909; and in Rock Island Plow Co. vs. Hill, Id., 242, the Court goes further and says that "even if the creditors knew that the mortgagor gave the deed of trust, not from a desire to secure them, but to defraud others, still, if the ob-

ject of the creditors was to secure themselves in a just debt, the instrument could not have been set aside for fraud."

These two decisions of the Court of Civil Appeals have, as we have seen, been sanctioned by the Supreme Court. That court has held, substantially, the same in Haas vs. Kraus, 86 Tex., 687.

If, as held in Simmons Hardware Co. vs. Kauffman, *supra*, excess of property mortgaged over the amount of debts secured does not vitiate a deed of trust as it does a direct sale to the creditors; and if, as held in Lewy vs. Fischl, *supra;* Owens vs. Clark, *supra*, and Sanger vs. Colbert, *supra*, a knowledge of fraud in the sale does not affect a creditor who has taken property not unreasonable in amount to pay his debt, then *a fortiori*, a creditor who has been secured in a deed of trust by an amount of property not unreasonably in excess of his debt, is not affected by a knowledge of fraud in the deed securing him. We have shown that in Simmons Hardware Co. vs. Kauffman, *supra*, an excess of more than 33⅓ per cent in a mortgage was not deemed unreasonable. We add that in La Belle vs. Tidball, 69 Tex., 161, an excess of 50 per cent in a direct sale was held not to vitiate it. In arriving at the value of the goods in that case, 40 per cent of their invoice price was deducted. The Court held that the preferred creditor was not bound to take the goods at either their retail or wholesale price in the place where they were located. If we apply this rule in the present case we find that the property conveyed, by the highest estimate, was not of value greater than 33 per cent over the amount secured, and that its value, as ascertained by actual administration, was less than the debts secured. We, therefore, claim that it was incumbent on the defendants below to show that all the accepting creditors participated in the fraud alleged against the deed of trust, or, at

least, that they had knowledge of it before accepting, and that there should not have been any question made as to their mere knowledge of facts to put them upon inquiry as to fraud.

To sum up on the question of notice of fraud to accepting creditors: 1. The uncontradicted evidence shows no fraud in the deed of trust, unless it arises from the alleged conspiracy between the grantors and Fellman, and the acts said to have been committed by the former in pursuance of such conspiracy.

2. If such circumstances show a fraudulent intent in making the deed, there is not a particle of evidence to show that this intent was known to the accepting creditors, much less that they participated in it.

3. That there is not even the slightest evidence to show that these creditors were in possession of facts to put them upon inquiry as to any such intent, which inquiry, if reasonably pursued, would have led up to a knowledge of this intent. That putting the most favorable construction for the defendants upon the evidence, some of the accepting creditors may have heard that the grantors were thought to be insolvent, and that as even knowledge of insolvency does not vitiate such a deed, facts that would have led up to such knowledge can not possibly have that effect.

The trial court, therefore, erred, as claimed in the nineteenth assignment of error, in charging the jury in effect, that they should find for the defendants if they believed that the accepting creditors knew of any fraud in the deed or were possessed of such information as would have put a reasonably prudent person upon inquiry. (Id., 278, 379.)

That court also erred in refusing the fifth special instruction asked by plaintiff, and especially that portion which instructs the jury that mere knowledge of Freiberg, Klein &

Co.'s insolvency was not sufficient to put the creditors upon inquiry as to the alleged fraudulent intent. (Id., 273, 274.)

And as the evidence showed, without contradiction, that all the debts secured were *bona fide* (Id., p. 196), and the Court had properly held that the deed was valid on its face, and the taking of the goods by the marshal from the possession of the trustee was undisputed, and some of the creditors had accepted the deed, the Court should have given the charge asked by the plaintiff, made the subject of the twelfth assignment of error, the measure of damages stated in the charge being that established by the Texas decisions, as we now proceed to show.

Third—As to the measure of damages:

The Texas Statutes regulating this matter reads as follows: "Rev. Stat., Art. 201. The writ of attachment shall be levied in the same manner as is or may be the writ of execution upon similar property."

"Art. 2349. A levy upon personal property is made by taking possession thereof when the defendant in execution is entitled to possession. Where the defendant in execution has an interest in personal property, but is not entitled to possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one them where there are several."

"Art. 2353. Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied upon and sold under execution against the person making the pledge, assignment or mortgage subject thereto; and the purchaser shall be entitled to the possession when it is held by the pledgee, assignee or mortgagee, on complying with the conditions of the pledge, assignment or mortgage."

These articles have been frequently construed by the Supreme Court of Texas, and it has been universally held that property mortgaged or assigned can not be levied on by seizure as in other cases, and if it is seized the officers and parties ordering such levy are trespassers, and liable for damages to the extent of the value of the goods seized.

In Scott vs. McDaniel, 67 Tex., 315, and Stiles vs. Hill, Fontaine & Co., 62 Tex., 429, it was held that the sheriff had no right to attach and take from a trustee or mortgagee property of the mortgagor rightfully in possession of such trustee or mortgagee.

In White vs. Sterzing, 32 S. W. Rep., 909, the measure of damages in a case precisely like the present was held to be the market value of the goods taken from the trustee's possession. This opinion was adopted by the Supreme Court. In Perry vs. Stephens, 77 Tex., 249, the Court, passing upon a seizure of goods in the possession of an assignee, provided for in the same statutes, says: "This was an action against trespassers for seizure of property. They occupied in the suit the position of wrongdoers, and were not entitled to convert the action into an equitable proceeding for the adjustment of equities." In that case the attaching creditors claimed that they owned all the claims against the assignor except a few, and asked to fix the amount of these so that they might pay them and defeat a recovery. But the Court refused this, holding it the duty of the assignee to collect the assets and distribute them among the creditors, and that he should receive the value of the whole property seized under the attachment.

Even if an adjustment is allowable in such cases, it could not have taken place in this action, as there was no pleading setting up such equities, or asking for such adjustment. If

there was the defendant would not have been entitled to it. (White vs. Sterzing, 32 S. W. Rep., 910.)

This rule is well supported by the decisions of other states. Adams vs. Connor, 100 Mass., 515; Ullman vs. Bernard, 7 Gray, 554; Pomeroy vs. Smith, 17 Pick., 85; Treadwell vs. Davis, 34 Cali., 601, 606; and is laid down as correct by eminent law writers; Jones on Pledges, Sec. 433; 3 Suth. on Damages, 525, 526. It was adopted and enforced in Martin-Brown Co. vs. Henderson, 28 S. W. Rep., 695, a decision of an intermediate Texas court, and also enforced in Rock Island Plow Co. vs. Hill, *supra*, a case approved by the Supreme Court. (See also Linz vs. Atchison, 38 S. W. Rep., 640; Middlebrook vs. Zapp, 72 Tex., 321; Willis vs. Thompson, 85 Tex., 301; Gunter vs. Cobb, 82 Tex., 598.)

The trial Judge in this case adopted this as the law, but refused to incorporate it in the foregoing charge asked by plaintiff. As showing that the measure of damages was correctly stated in the charge asked, we refer the Court to Blum vs. Merchant, 58 Tex., 400; Heidenheimer vs. Schlott, 63 Id., 396; Wallace vs. Finberg, 46 Tex.. 35; Tucker vs. Hamlin, 60 Tex., 174; Sedgw. on Damages, 663, and the cases already cited.

The Circuit Court of Appeals, when this cause was before it, justified this refusal of the trial Judge on the ground that it asked him to make five distinct special findings of fact on complicated issues, in favor of the plaintiff. (Id., 284.) These five are doubtless as follows: 1. That the deed of trust was valid on its face. This was a question of law and not of fact, and the Court had found it in favor of the plaintiff, and no additional labor was imposed on him to include it in this charge. (Id., 284.) 2. That the secured debts were all *bona fide*. There was no complication in this issue, as there was no denial of it, and it was clearly proved, and

there was no evidence to the contrary. 3. That some of the creditors accepted the deed before the levy of the attachment. We have already shown that there was no conflict in the testimony as to this, but that it was distinctly and positively proved. 4. That these creditors had no notice of the fraud. We have shown that there was not a scintilla of evidence to show such notice, and the Court should have so charged. 5. That the marshal took the goods from the plaintiff, who was lawfully in possession of them, under an attachment sued out by the Christian Moerlein Brewing Company. That they were seized as stated was pleaded by the defendants themselves, and if the other facts stated in the charge were true, the trustee's possession could be nothing else but lawful.

It is clear, therefore, that there was no question to submit to the jury except the amount of damages to be found by the jury, and this the charge left open for its determination. Leaving the other matters to the jury was to assume as doubtful that which was clear, and to assume hypotheses at variance with the certain facts, which is held to be erroneous, even in Texas, where judges are forbidden to charge on the weight of testimony. (I. & G. N. R. R. Co. vs. Stewart, 57 Tex., 166, 170; Wintz vs. Morrison, 17 Tex., 387.)

Where there is no question of credibility of testimony or weight of evidence upon which the verdict depends, but an absence of evidence as a basis for a verdict for the defendants, the Court should instruct a verdict for plaintiffs. See Bondies vs. Ivey, 39 S. W. Rep., 158, and authorities cited; White vs. Sterzing, *supra*.

The decisions of the U. S. courts are even more rigid in requiring peremptory charges to the jury for one party where the other has failed to produce evidence to sustain its side of

an issue, and this more especially where the burden of proof is upon the party thus failing, as was the case in the matter of notice of fraud in this case.

In Chandler ys. Reeder, 24 How., 224, this court said: Whether there be any evidence is a question for the Judge; whether there be sufficient evidence is for the jury, and that the trial court erred in submitting the decisions of questions when there was no evidence to raise them. Here there was no evidence to raise the question of fraud, but merely as to notice of insolvency.

In Commrs vs. Clark, 94 U. S., 278, 284, this court went further and said: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." In this case there was not even a scintilla of evidence that would authorize the Judge to submit either the question of acceptance or of notice to the jury.

We also refer the Court to the following authorities sustaining the views already expressed: Sullivan vs. Mining Co., 143 U. S., 431; Armour vs. Hahn, 111 U. S., 313; Steamship Co. vs. Merchant, 133 U. S., 375. See also N. P. R. R. Co. vs. Clearless, 2 C. C. App., 39.

In asking the charge in question the plaintiff was pursuing the course pointed out by this court in H. L. & I. Co. vs. Unsell, 144 U. S., 439. We asked a peremptory charge to find for the plaintiff, and submitted no other instructions until this peremptory charge was refused. (Rec., p. 79, *et sequentes.*)

It would seem, however, under the decisions in T. P. Ry. Co. vs. Patten, 61 Fed. R., 259, this judgment could not stand, even if we had not asked the peremptory instruction, for in

that case it was held by the eminent Circuit Judge, who also rendered the opinion in the present case, that if we had failed to ask the peremptory charge, yet as we have brought up all the evidence on this writ of error we were entitled to a reversal of the judgment if that evidence did show, without contradiction, that the deed of trust was accepted by some of the preferred creditors without notice of fraud.

We fail to see that the number of facts the Judge has to determine in order to arrive at the conclusion that a verdict should go for one party or the other, can affect the question if the evidence is all on one side as to these facts. We were not asking a charge in our favor upon disputed facts, and had as well requested the Court to direct a verdict for plaintiff without setting out the reasons for the request. In the case of Armour vs. Hahn, *supra*, the Court had to find several facts before reaching the conclusion that the judgment should be for the defendant, and yet this court held that judgment should have been thus rendered on a demurrer to the evidence. And in the Texas case of King vs. Estill, 75 Tex., 484, in order to reach a verdict for the plaintiff the jury would have had to find seven different facts in his favor, and yet the court held that the Judge should have directed such a verdict, thus compelling him to find these facts himself. In that case no request was made for a peremptory charge in favor of the plaintiff, yet the special charges asked called attention to the important matters embraced in them, and on the case made by the evidence it was held that the Court should have instructed a verdict for plaintiff.

This holding is approved in Texas Pacific Ry. Co. vs. Patton, and made the basis of the decision. It seems therefore that even if our peremptory instruction should not have been given it was sufficient to call the attention of the Court to the fact

that there was no evidence to prevent a recovery for the plaintiff, and he should have so instructed.

The error of the Circuit Court of Appeals on this question is made the subject of the 22d assignment of error. (Rec., pp. 280, 281.) We also claim that that court erred in holding that the only question submitted to its decision on the appeal was as to the refusal by the trial court of the peremptory charge. We respectfully submit that all the assignments of error relied on in this court were urged before the Circuit Court of Appeals. We have already considered several of them, arising under the giving and refusal of instructions. We now proceed to such as relate to rulings upon the evidence.

It will be seen by reference to our ninth assignment of error that the Court allowed the witness Werner to testify as to interviews between himself, Seinsheimer and Freiberg, in which the latter stated that after they got a settlement they would go right ahead, the beer would not change hands at all, go to the same customers, and that the firm was in such a shape that it was obliged to fail. This related to matters occurring after the deed of trust was made, and was incompetent to affect their interests. (Id., 269.) There was no proof of any conspiracy between the makers of the deed and the preferred creditors, or any of them, or of the trustee, to defraud the other creditors of Freiberg, Klein & Co., and no such declaration made by any of the firm which had parted with the possession of the property could be admitted in evidence.

Winchester & Partridge Co. vs. Creary, 113 U. S., 101.

Jackson vs. Hardy, 70 Texas, 415.

The eleventh assignment of error questions the action of the trial court in allowing the witness Gorse to state as to rumors in Galveston in the year 1892 that Freiberg, Klein &

Co. were insolvent, he having refused to state when cross-examined the names of the persons from whom he heard these rumors, or give particular facts. (Id., 271, 272.) The evidence shows that the only fact relied on by the defense to show that the accepting creditors were put upon inquiry as to fraud in the deed of trust was the rumor alleged to be current in Galveston in 1892 that Freiberg, Klein & Co. were insolvent. If, in the view of the Court, such a rumor could cause this inquiry, then the plaintiff was entitled to know when and where and from whom the witness heard it, so as to test his credibility, and to know the exact character of the rumor by questioning the parties from whom the witness purported to derive his information, and his refusal to give their names should have excluded the testimony.

To sum up our argument in this case, we submit to the Court:

1. The deed of trust was valid on its face.

In addition to the authorities already cited upon this point, we cite:

Simon vs. McDonald, 20 S. W. Rep., 52.

Willis vs. Thompson, 85 Texas, 301.

2. All the debts secured in the deed were *bona fide*, and the deed was duly accepted by a portion of the secured creditors before levy of the attachment, and these facts were established by uncontroverted testimony.

3. Neither these creditors nor the trustee participated in the fraudulent intent of the deed, if such existed, or had any knowledge of it, at the time they accepted its provisions. Such being the case, and their debts being *bona fide*, they were not affected by such fraud. This is the law, whether the property mortgaged was in value exceeding the debts secured or not, but the case is much stronger for its applica-

tion when as here it was not enough to pay the preferred debts and the expenses of the trust. This is not only the law of Texas, but is supported by the authorities of other states.

Coblie on Mortgages, Sec. 771.

Eureka Steel Works vs. Breonahan, 33 N. W. Rep., 834.

Adams vs. Neiman, 46 Mich., 135.

4. Even upon the theory that a fraudulent deed of trust preferring creditors is invalid, if the preferred creditors were in possession of any fact that put them upon inquiry as to such fraud, which inquiry, if reasonably pursued, would have led up to a knowledge of the fraud, the present deed is valid, not a particle of evidence having been introduced to show that the trustee or preferred creditors were put on such inquiry; or, if they were, that the inquiry would have led to any discovery of fraud. The only circumstances relied on to put upon inquiry were rumors of insolvency, and insolvency itself would not have affected the deed. The burden of proof as to notice is upon the defendants in all cases when notice is relied on to vitiate a transaction.

Wofford vs. Farmer, 40 S. W. Rep., 738; approved by Supreme Court in 40 S. W. Rep., 788.

5. The goods in controversy being in the possession of the trustee under a deed of trust—valid and in force as to accepting *bona fide* creditors who were not tainted with any fraud in its execution—the seizure of these goods was in violation of the statutes of Texas, and a trespass for which the measure of damages was their value at the time and place of seizure; and no other verdict, except for such value, was allowable under the pleadings and evidence in the case, and this was therefore the only matter to be submitted to the jury.

6. The foregoing propositions being correct in law and supported by uncontroverted evidence, it was the duty of the

trial Judge to enforce them by a charge to the jury which did not leave to them either the validity of the deed on its face or its acceptance by preferred creditors; or notice of fraud to such creditors; or the fact of the levy of the attachment; or the measure of damages prescribed by law; but only the amount of damages according to such measure; two of these matters being questions of law for the court, and the other three proven by unimpeached and uncontroverted evidence.

7. The Court should have given the instructions set forth in the sixteenth assignment of error (Rec., p. 275); also, in bill of exceptions (Rec., p. 81), to the effect that the fraud of an endorser would not affect the right of the owner of the claim who had no notice of it.

8. We further claim that a question should not have been left to the jury where the evidence raised no issue as to it, such as the acceptance of the deed; or when the finding upon it, either one way or the other, should not have influenced the verdict, such as notice of the insolvency of the makers of the deed.

9. We claim also that as upon the whole evidence the plaintiff was entitled to a verdict for damages, and a peremptory charge to that effect was asked by the plaintiff, it was the duty of the trial Judge to so charge, and that failing to do so we are entitled to a reversal if the evidence is insufficient to support the verdict, whether we specially excepted to the evidence or not, the charge asked having called the attention of the Court to the insufficiency of the testimony.

Texas & Pacific Ry Co. vs. Patten, 61 Fed. R., 259, 267.

As said in that case: "The request for that charge in effect, asked the Court to direct a verdict for the 'plaintiff,' and 'the hypothesis as to the proof made in the requested

charge only embraced matters of fact, about which there was no dispute.' "

We respectfully submit that the judgments of the trial court and of the Circuit Court of Appeals are erroneous upon each and every ground set forth herein, and respectfully ask that they be reversed.

A. H. Willis,

Attorney for Plaintiff in Error.